(8)

{SHOW } PROCEEDINGS AND ORDERS DATE: 120684

CASE NBR 83-1-05878 CFX
SHORT TITLE Shapiro, Alfred B., et al. DOCKETED: Dec 8 1983
VERSUS DEA

Date	Proceedings and Orders
Dec 8 1983	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 4 1984	Order extending time to file response to petition until February 8, 1984.
Feb 3 1984	Order further extending time to file response to petition until March 9, 1984.
Mar 9 1984	Brief of respondent Drug Enforcement Admin. in opposition filed.
Mar 13 1984	Reply brief of petitioners Shapiro and Wentz filed.
Mar 15 1984	DISTRIBUTED. March 30, 1984
Mar 26 1984	REDISTRIBUTED. March 30, 1984
Apr 2 1984	Petition GRANTED. The case is consolidated with 83-1045, and a total of one hour is allotted for oral argument.
May 7 1984	Order extending time to file brief of petitioner on the

CONTINUE {
{SHOW } PROCEEDINGS AND ORDERS DATE: 120684

CASE NBR 83-1-05878 CFX
SHORT TITLE Shapiro, Alfred B., et al. DOCKETED: Dec 8 1983
VERSUS DEA

Date	Proceedings and Orders
May 7 1984	Order extending time to file brief of petitioner on the merits until June 18, 1984.
May 22 1984	Joint appendix filed.
Jun 18 1984	Brief of petitioners Shapiro and Wentz filed.
Jun 25 1984	Record filed.
Jun 27 1984	Motion of respondent in No. 83-1045 and petitioners in No. 83-5878 for divided argument filed.
Jul 5 1984	Record filed.
Jul 5 1984	Certified original record & C.A. proceedings received. (2 volumes).
Jul 30 1984	Brief of respondent Drug Enforcement Admin. filed.
Aug 9 1984	Motion of respondent in No. 83-1045 and petitioners in No. 83-5878 for divided argument GRANTED.
Oct 29 1984	Motion of the Solicitor General to vacate filed.
Oct 25 1984	Motion of petitioners Shapiro and Wentz for summary

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{SHOW } PROCEEDINGS AND ORDERS DATE: 120684

2 pp

CASE NBR 83-1-05878 CFX
SHORT TITLE Shapiro, Alfred B., et al. DOCKETED: Dec 8 1983
VERSUS DEA

Date	Proceedings and Orders
Oct 25 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 filed.
Nov 5 1984	DISTRIBUTED. Nov. 9, 1984. (Motion of S.G. to vacate. Motion of petitioners for summary reversal).
Nov 6 1984	Opposition of petitioners in NO. 83-5878 to motion of the Solicitor General to vacate filed.
Nov 3 1984	Motion of respondent Provenzano for summary affirmance of the judgment in No. 83-1045 filed.
Nov 13 1984	DISTRIBUTED. Nov. 21, 1984. (Motion of S.G. to vacate & motion of petitioners for summary reversal).
Nov 26 1984	Motion of respondent Provenzano for summary affirmance of the judgment in No. 83-1045 DENIED.
Nov 26 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 DENIED. The judgments below are vacated, and the cases are remanded

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 120684

CASE NBR 83-1-05878 CFX
SHORT TITLE Shapiro, Alfred B., et al. DOCKETED: Dec 8 1983
VERSUS DEA

Date	Proceedings and Orders
Nov 26 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 DENIED. The judgments below are vacated, and the cases are remanded to the United States Court of Appeals for the Third and Seventh Circuits, respectively, for such further proceedings in conformity with the Per Curiam opinion filed this date. Dissenting statement in No. 83-1045 by Justice Stevens.

No.

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 6, 1983

QUESTION PRESENTED*/

Whether the Privacy Act, 5 U.S.C. § 552a, constitutes a partial repeal of the Freedom of Information Act, 5 U.S.C. § 552, and thus constitutes the sole means by which individuals may seek disclosure of information about themselves that has been collected by federal law enforcement agencies, so that such individuals may categorically be denied access to information about themselves, in the unreviewable discretion of an agency head under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), while third-parties can be denied access to the same information only to the extent that parts of it may be exempt from disclosure, subject to judicial review, under the specific exemptions of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9).

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*/ Petitioners, who are individuals, were the only parties plaintiff in the district court. Respondent Drug Enforcement Administration, an agency of the federal government, was the only defendant below.

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Other Authorities

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House Comm. on Gov't Operations and Senate Comm. on the Judiciary, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, 94th Cong., 1st Sess. (Jt. Comm. Print) (1975)..... 14

Hulett, Privacy and the Freedom of Information Act, 27 Ad. L. Rev. 275 (1975)..... 11

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Alfred B. Shapiro and Gregory J. Wentz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-18a) is not yet reported. The memorandum opinion of the district court (App. B, infra, 19a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra, 25a) was entered on November 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, are set forth in Appendix I (see App. I, infra, 35a-40a).

STATEMENT

The Requests

In May 1981, Gregory J. Wentz, who was then a federal prisoner, filed a request under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, asking that DEA provide him with copies of agency records pertaining to him (App. A, infra, 2a). In July 1981, Mr. Wentz filed a further request, seeking disclosure of DEA records used in preparing a pre-sentence report following his conviction (O.R. Item 19 (Wentz)). In March 1982, when DEA still had not acted on these requests, Mr. Wentz commenced this action to require release of the requested materials (App. A, infra, 2a). Pursuant to the Privacy Act, Mr. Wentz later amended his complaint to seek the correction of certain errors he believed to be contained in his DEA records (ibid.). In April 1982, DEA denied Mr. Wentz's requests (ibid.). The agency asserted (ibid.) that all of the requested documents were exempt from disclosure under the Privacy Act because they were contained in the DEA Investigative Reporting and Filing System, which had been declared by regulation to be exempt from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), and, further, that the documents were exempt from disclosure as a matter of law under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3).

In October 1981, Alfred B. Shapiro, who was then a federal prisoner, filed a similar request under FOIA and the Privacy Act, seeking access to DEA records pertaining to him (App. A, infra, 2a). In May 1982, when DEA still had not acted on Mr. Shapiro's request, he brought suit to require disclosure of the requested documents (ibid.). In June 1982, DEA advised Mr. Shapiro that the documents he sought

were contained in the DEA Investigative Reporting and Filing System and were therefore exempt from disclosure under both statutes (ibid.).

The District Court Proceedings

DEA moved for summary judgment in both actions, based upon virtually identical affidavits authored by Mr. Russ Arslan, the DEA official in charge of such requests (App. A, infra, 4a-5a & n.4), who asserted that all the requested documents were contained in a system of records that had been exempted from disclosure by a regulation (28 C.F.R. § 16.98) properly promulgated under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2).

On August 4, 1982, the United States District Court for the Western District of Wisconsin denied Mr. Wentz's motion to require DEA to prepare a Vaughn index of the requested materials (App. F, infra, 28a-30a). The two cases were consolidated for decision and, on October 8, 1982, the district court granted DEA's motions for summary judgment (App. B, infra, 19a-24a). The district court held that the requested records were exempt from disclosure under Section (j)(2) of the Privacy Act because they were contained in a system of records which DEA had, by regulation (28 C.F.R. § 16.98(c)), properly exempted from disclosure (App. B, infra, 22a-23a). The district court further held that the Privacy Act is an exempting statute under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), and that the records were therefore also exempt from disclosure under FOIA (App. B, infra, 21a). Finally, the district court upheld the agency's determination that Section (j)(2) applies to the correction provisions of the Privacy Act, 5 U.S.C. § 552a(g)(4), and therefore determined that the agency had correctly denied Mr. Wentz's request for such relief (App. B, infra, 23a).

On November 16, 1982, the district court granted leave to Mr. Shapiro and Mr. Wentz to proceed on appeal in forma pauperis (App. G, infra, 31a-32a; App. H, infra, 33a-34a).

The Court of Appeals Proceedings

On November 16, 1983, the Seventh Circuit affirmed the judgments in both cases (App. A, infra, 1a-18a). First, the court of appeals held (App. A, infra, 4a-5a) that the requested records were exempt from disclosure under the Privacy Act because the affidavits submitted by DEA established that the records were contained in its Investigative Reporting and Filing System, which, pursuant to the procedures mandated by Section (j)(2) of the Act, 5 U.S.C. § 552a(j)(2), had been declared by regulation (28 C.F.R. § 16.98(c)) to be exempt from disclosure.

Second, the court held that DEA was not required to prepare a Vaughn index because Section (j)(2) of the Privacy Act, unlike the particularized exemptions of FOIA (5 U.S.C. § 552(b)), applies to entire systems of records (App. A, infra, 5a). Once it has been determined that the requested information is contained in a system of records that has been exempted from disclosure in compliance with the procedural requirements of Section (j)(2), the court held, there is no need to prepare an index of withheld documents because no further judicial inquiry is required (App. A, infra, 5a-6a).

Third, the court of appeals held that the requested records were also exempt under FOIA (App. A, infra, 6a-17a). In reaching this conclusion, the court relied on FOIA Exemption 3, 5 U.S.C. § 552(b)(3), which "provides that the FOIA does not apply to information 'specifically exempted' by other statutes" (App. A, infra, 6a; footnote omitted). As

the court noted, "to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must 'leave no discretion on the issue' of disclosure, or must establish particular criteria for withholding' or refer to 'particular types of matters to be withheld'" (App. A, infra, 8a; quoting 5 U.S.C. § 552(b)(3)). While the court recognized that the plain language of Section (j)(2) grants uncanalized discretion to an agency head to exempt "any system of records within the agency from [the disclosure and other requirements of] any part of this section," that is, the Privacy Act, the court held that this provision also exempts such records from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (App. A, infra, 9a; emphasis in original). The court further held that "[s]ince [Section] (j)(2) also covers requests for corrections, the denial of Wentz's request for correction of the allegedly inaccurate records also was proper" (App. A, infra, 17a).

Although the court recognized that Section (b)(2) of the Privacy Act, 5 U.S.C. § 552a(b)(2), specifically preserves FOIA disclosure obligations, the court held that this savings clause applies only to so-called "third-party requests," that is, to requests by persons who are seeking information about others, rather than themselves (App. A, infra, 10a). The court believed that this construction, which would "allow[] both acts to retain their full meaning" (App. A, infra, 15a), was buttressed by the legislative history, which the court found to reflect Congress's intention to safeguard "'particularly sensitive information'" by limiting the access of individuals to "'their own intelligence or investigative files'" (App. A, infra, 12a; quoting H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 18 (1974) and S.Rep. No. 93-1183, 93d Cong., 2d Sess. 23 (1974)).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF TWO OTHER CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The court below held that Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), renders inapplicable the disclosure provisions of FOIA, 5 U.S.C. § 552, in cases in which an individual seeks access to information that a government law enforcement agency has compiled about him. If such information is contained in a system of records that has been exempted from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), the information is also exempt from disclosure, the court held, under the independent provisions of FOIA. Whether the exemption contained in Section (j)(2) bars disclosure under FOIA, as well as under the Privacy Act, is an important question of federal law.

In attempting to resolve this question, the courts of appeals have exhaustively considered the relevant statutory language and legislative history, but have been unable to reach consistent results and have settled into a clear pattern of conflict. The decision below is consistent with the Seventh Circuit's prior decision in Terkel v. Kelly, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980), and with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980). However, the decision below is irreconcilable with the decisions of the District of Columbia Circuit in Greentree v. United States Customs Service, 674 F.2d 74 (1982), and the Third Circuit in Porter v. United States Department of Justice, 717 F.2d 787 (1983), and Provenzano v. United States Department of Justice, 717 F.2d 799, reh. denied, ___ F.2d ___ (Nov. 10, 1983).

Given the importance of the question presented and the irreconcilable conflict among the courts of appeals on this question, review by this Court is now warranted.

A. The Question Presented Is An Important Question Of Federal Law.

Although FOIA provides that disclosure must be made to "any person" (5 U.S.C. § 552(a)(3)), except to the extent that certain information may be exempt from disclosure under one of the nine specific FOIA exemptions (see 5 U.S.C. § 552(b)(1)-(9)), the court below held that the disclosure rights of persons who seek information about themselves are limited to those granted by Section (d) of the Privacy Act, 5 U.S.C. § 552a(d), which may, in turn, be wholly abrogated by regulation under Section (j)(2), 5 U.S.C. § 552a(j)(2). The court's holding rests upon the premise that Section (j)(2) of the Privacy Act constitutes a FOIA Exemption 3 statute (see 5 U.S.C. § 552(b)(3)), that is, that it is a statute which constitutes a specific bar to disclosure.

The result of the court's holding is that "third-party" requesters (persons who seek information about others) and legal persons (such as corporations, which are not subject to the Privacy Act) will be afforded access to whatever information they seek, except to the extent that some of it may fall within one of the nine specific FOIA exemptions (5 U.S.C. § 552(b)(1)-(9)), in which case segregable portions may be withheld, subject to judicial review. On the other hand, "first-party" requesters (persons seeking information about themselves) will categorically be denied access to any information contained in any system of records which an agency head has declared by regulation to be exempt from disclosure under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2). Pursuant to the court's reasoning,

first party requesters will not be entitled to the production of any segregable portions of records, to a Vaughn index (see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)), or to in camera review of the records.

Whether this anomalous result is required by the language or legislative history of these two statutes is an important question of federal law that has been heavily litigated in the lower federal courts. See App. A, infra, 7a-8a (citing cases). Federal law enforcement agencies routinely collect vast amounts of information, which is used in numerous ways that affect the lives of individuals and the well-being of our society. The purpose of both FOIA and the Privacy Act is to make government more accountable to the people and "to respond to the potential excesses of government." Greentree v. United States Customs Service, 674 F.2d 74, 76 (D.C. Cir. 1982). Individuals who have a particularized interest in government information gathering, based upon their belief that the government has acted improperly in gathering information about them, have a special incentive to seek out the truth about government investigative activities and therefore help to protect the rights of all Americans. Whether Congress intended, in enacting the Privacy Act, to withdraw from the subjects of government records the disclosure rights granted by FOIA to all members of the public is a singularly important question of law.[1/] Whether such persons are entitled by law to have their requests considered under the same criteria applied to

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1/ The applicablity of FOIA to first-party requests is, of course, a threshold question. If FOIA applies to such requests, further proceedings will be required to determine whether any parts of the requested information are exempt from disclosure under the specific exemptions contained in FOIA. See, e.g., Greentree v. United States Customs Service, supra, 674 F.2d at 88.

requests made by members of the public is too important a question to be resolved by the place in which a lawsuit happens to be filed.[2/] Because the courts of appeals have exhaustively considered this question and have settled into a clear pattern of conflict, review by this Court is now warranted.

B. An Irreconcilable Conflict Exists Among The Courts Of Appeals On This Issue.

The Seventh Circuit's decision in the case at bar follows its earlier decision in Terkel v. Kelly, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980), and is consistent with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980). In Terkel, the Seventh Circuit upheld the FBI's invocation of Section (k)(5) of the Privacy Act, 5 U.S.C. §552a(k)(5), as a barrier to disclosure on the ground that "the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt" (599 F.2d at 216). In Painter, the Fifth Circuit followed Terkel and upheld the right of the FBI to withhold records, rejecting the district court's conclusion that "Congress did not intend Privacy Act exemptions to be applicable in FOIA cases" (615 F.2d at 690).

However, the decision below is wholly irreconcilable with the decision of the District of Columbia Circuit in Greentree v. United States Customs Service, 675 F.2d 74, 86-88 (1982), which explicitly rejected as unsound the holdings in Terkel and Painter. The Greentree court rejected

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2/ Moreover, absent resolution of this conflict, more sophisticated requesters will doubtless engage in forum-shopping because both FOIA and the Privacy Act provide that suit may be brought in the District of Columbia, among other places. See Section (a)(4)(B) of FOIA, 5 U.S.C. § 552(a)(4)(B); Section (g)(5) of the Privacy Act, 5 U.S.C. § 552a(g)(5). The accessibility of government records should depend upon principle and not upon the wiliness of requesters.

the government's contention that the exemption from disclosure contained in Section (j)(2) of the Privacy Act extends to FOIA as well as to the Privacy Act itself. As the court noted (674 F.2d at 79), Section (j)(2) explicitly refers only to disclosures otherwise required by "this section," that is, the Privacy Act. This exemption is therefore "self-contained" and "limit[s] only other provisions of the Privacy Act itself" (674 F.2d at 79).[3/] The court also rejected the government's contention that Section (b)(2) of the Privacy Act, 5 U.S.C. § 522a(b)(2), which clearly preserves FOIA disclosure rights, applies only to third-party requesters. As the court stated (674 F.2d at 79), "we are not at liberty to limit the safeguards of (b)(2), which extend to requests by 'any person.'"

The Greentree court also found that the relevant legislative history was consistent with the plain language of the Privacy Act (674 F.2d at 81-84). Moreover, as the court noted, "Congress was considering the Privacy Act while it was preparing to override President Ford's veto of the 1974 FOIA amendments" (674 F.2d at 83), amendments to which President Ford objected because they "increased accessibility of national security and law enforcement documents . . . [under FOIA] Exemptions 1 and 7" (674 F.2d at 84). Thus, as the court explained (674 F.2d at 84): "We are hard pressed

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3/ This construction of Section (j)(2) does not diminish its importance in the overall statutory scheme. The Privacy Act provides numerous rights, in addition to disclosure, to first-party requesters. For example, Section (e)(2) requires that an agency "collect information to the greatest extent practicable directly from the subject individual" (5 U.S.C. §552a(e)(2)); Section (e)(3)(B) requires that the individual be told of "the principal purpose or purposes for which the information is intended to be used" (5 U.S.C. §552a(e)(3)(B)); and Section (d)(2) permits "the individual to request amendment of a record pertaining to him" (5 U.S.C. §552a(d)(2)). The discretion granted to agency heads by Section (j)(2) to exempt systems of investigatory records from such requirements is clearly significant in itself. See pages 15-16, infra.

to accept an interpretation of the Privacy Act that in effect repeals, for first party requesters, those amendments only a few weeks after they were enacted over a Presidential veto."

Finally, the Greentree court was impressed by "the fact that the predominant government policy since initial implementation until this appeal has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA" (674 F.2d at 85; footnotes omitted). In 1975, as the court noted, the OMB, the agency charged by Congress with developing government-wide implementing regulations under the Privacy Act, concluded that the two statutes should be construed so as "to assure [that] individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they did prior to its enactment" (674 F.2d at 86 n.28, quoting 40 Fed. Reg. 56743 (1975)).4/

4/ The OMB's contemporaneous construction of the Privacy Act is entitled to great weight because it is the construction of those government officials specifically charged by Congress "'. . . with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new.'" Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961), quoting Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). Moreover, the same conclusion was reached by the Privacy Protection Study Commission, which was established by Congress under Section 5 of the Privacy Act, Pub.L. 93-579, §5 (Report of Privacy Protection Study Commission App. 4 at 37 (1977)). The earliest commentators also took the same position. See Note, The Privacy Act of 1974: An Overview, 1976 Duke L. J. 301, 312-13. See also Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 596, 624-26 (1976); Hulett, Privacy and the Freedom of Information Act, 27 Ad. L. Rev. 275, 288 (1975); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev 971, 1338-39 (1975). Cf. K. Davis, Ad. Law Treatise § 5.43 at 53 (2d ed. 1980 Supp.).

On August 10, 1983, the OMB published a contrary regulation for public comment. The new regulation provides that "[t]he Privacy Act and the FOIA should be read together to

(Footnote continued on following page.)

The decision below is also irreconcilable with the Third Circuit's decisions in Porter v. United States Department of Justice, 717 F.2d 787 (1983), and Provenzano v. United States Department of Justice, 717 F.2d 799 (1983), reh. denied, ____ F.2d ____ (Nov. 10, 1983). In Porter, the principal opinion, the Third Circuit noted its agreement with the Greentree court's "searching analysis of the interrelationship between the two statutes" (717 F.2d at 796), but proceeded to make an independent review of the language and legislative history (717 F.2d at 796-799). The Third Circuit, like the District of Columbia Circuit, explicitly rejected the holdings in Terkel and Painter because it found nothing in the language or legislative history of the statutes "which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of the Freedom of Information Act by making it the sole means of access for first-party information" (717 F.2d at 798). Also like the District of Columbia Circuit, the Porter court noted that its construction was not only the one given the statute shortly after its enactment by the agency charged by Congress with its implementation, but the one that the government had followed until it filed its appellate brief in Greentree (717 F.2d at 798-99).[5/]

(Footnote continued from preceding page.)

permit an agency to deny access to records sought by the subject individual under the FOIA on the basis of exemption (b)(3) if those records are exempted from release to the individuals under the Privacy Act" (48 Fed. Reg. 36359). The only explanation that the OMB offered for this change was that "[t]his interpretation is supported by the majority of courts that have reviewed the question of the relationship between the two laws" (id.).

5/ See also Clarkson v. IRS, 678 F.2d 1368, 1376 (11th Cir. 1982) (Tuttle, J.) (quoting Guidebook to the Freedom of Information and Privacy Acts 21-22 (R. Bouchard & J. Franklin ed. 1980) (a person may use "'the Privacy Act or the FOIA or both to seek access to information about himself in agency records and is entitled to the cumulative total of access rights under the two Acts'")).

Just as the Greentree and Porter courts rejected the reasoning of Terkel and Painter, the Seventh Circuit in the case at bar explicitly rejected the holdings in Greentree and Porter and "reaffirmed our earlier decision" in Terkel (App. A, infra, 8a). Four circuits have now considered this question, and, despite exhaustive consideration of the statutory language and legislative history, they have been unable to reach consistent results. The issue presented is therefore ripe for review by this Court.

II.

THE DECISION BELOW IS INCORRECT AS A MATTER OF LAW.

The court below held that FOIA, 5 U.S.C. § 552, provides no rights to individuals seeking access to government records pertaining to themselves. The court held that access by individuals to such materials is available only under the Privacy Act, which, however, specifically provides that an agency head may exempt from disclosure whole systems of records. The holding below, which effectively repeals FOIA insofar as first-party requesters are concerned, is incorrect.

A. The Language And Legislative History Demonstrate That Congress Did Not Intend The Privacy Act As A Partial Repeal Of FOIA.

The language of Section (j)(2) of the Privacy Act evidences no congressional intent that the Privacy Act should be deemed the exclusive means for first-party requesters to gain access to government records pertaining to themselves. Indeed, the statutory language specifically provides to the contrary. In terms, the exemption from disclosure contained in Section (j)(2) applies only to disclosures required by "any part of this section," that is, the Privacy Act. As the District of Columbia Circuit has held, this

portion of the Privacy Act is "self-contained" and "limit[s] only other provisions of the Privacy Act itself." Greentree v. United States Customs Service, 674 F.2d 74, 79 (1982). "Had Congress intended to authorize the creation by regulation of exemptions from the Freedom of Information Act it would have used language such as 'this title' rather than 'this section.'" Porter v. United States Department of Justice, 717 F.2d 787, 797 (3d Cir. 1983). In addition, Section (b)(2) of the Privacy Act, 5 U.S.C. § 552a(b)(2), specifically preserves whatever rights of disclosure already exist under FOIA and, contrary to the holding below, makes no distinction whatever between "first-party" and "third-party" requesters.

As the District of Columbia Circuit noted in Greentree (674 F.2d at 81-84), the legislative history of the Privacy Act is fully consistent with the plain language of the statute, as are the more general circumstances in which Congress enacted this statute. The Privacy Act was enacted only 40 days after Congress had overridden President Ford's veto of the 1974 FOIA amendments, which the president had vetoed because they substantially narrowed agency discretion to withhold investigatory files under Exemption 7. See 10 Weekly Comp. of Pres. Docs. 1318 (1974). Prior to the 1974 FOIA amendments, the courts had upheld the nondisclosure of any information that happened to be maintained in a law enforcement "file," but Congress disagreed with that broad construction of Exemption 7 (see H.R. Conf. Rep. No. 93-1380, 93rd Cong., 2d Sess. 12 (1974)) and determined that the scope of Exemption 7 should be narrowed to include "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would be harmful to one of six specific law enforcement interests." House Comm. on Gov't Operations and Senate Comm. on the

Judiciary, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, 94th Cong., 1st Sess. 332 (Jt. Comm. Print) (1975) (emphasis added).

Contrary to the holding below, it is inconceivable that Congress would have intended to rebuild in the Privacy Act the very same impenetrable barrier to disclosure of "investigatory files" that it had dismantled, by overriding a presidential veto, only 40 days earlier.[6/] Moreover, the fragments of legislative history upon which the court below relied (see App. A, infra, 11-13) in reaching the opposite conclusion lend no support to it. Those fragments show only that Congress recognized that the Privacy Act would itself create disclosure and other rights far broader than those created by FOIA and, indeed, merely manifest Congress's intention that the subjects of law enforcement records should not be entitled to those broader rights. See Sections (d) and (e) of the Privacy Act, 5 U.S.C. §552a(d) and (e). See also page 10, note 3, supra. That Congress expressed concern regarding access to investigatory files under the more far-reaching provisions of the Privacy Act does not demonstrate that Congress intended Section (j)(2) of the Privacy Act to preclude disclosure under FOIA in

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6/ As the District of Columbia Circuit noted in Greentree, the government had forcefully made this point in its district court brief in that case, which stated (674 F.2d at 85 n.27):

> "It would be anomalous indeed for Congress to override a presidential veto, which was in part based on Congress' narrowing of exemption 7, only to reinstate forty days later (via the Privacy Act) the discretionary power to deny total access to investigatory material. There is no indication whatsoever in the legislative history of the Privacy Act to indicate that Congress intended such an abrupt reversal of its recent narrowing of exemption 7."

those circumstances in which disclosure was required under the standards independently established by FOIA. In short, the decision below is based principally on presumed considerations of public policy, rather than on the language and legislative history of the two statutes at issue here.

B. Section (j)(2) Of The Privacy Act Is Not An Exemption 3 Statute.

Section (j)(2) of the Privacy Act would not meet the statutory requirements of FOIA Exemption 3 even if Section (j)(2) were not, as it is, specifically self-contained and limited in its applicability to other provisions of the Privacy Act. FOIA Exemption 3 exempts from disclosure matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

Section (j)(2) does not meet the requirements of Proviso A because Section (j)(2) grants totally uncanalized discretion to an agency head. Section (j)(2) gives the agency head "cart blanche to withhold any information he pleases." H.R. Rep. No. 94-880, pt. 1, 94th Cong., 2d Sess. 23 (1976). Similarly, Section (j)(2) does not meet the particularity requirements of Proviso B. By allowing an agency head to exempt from disclosure all of an agency's systems of investigatory files, Section (j)(2) does not establish "particular criteria for withholding," nor does it refer "to particular types of matters to be withheld."

In 1976, Congress amended Exemption 3 of FOIA to overrule FAA v. Robertson, 422 U.S. 255 (1975), in which

this Court held that certain withholding provisions of the Federal Aviation Act qualified as an Exemption 3 statute. See H.R. Rep. No. 94-880, pt. 1, 94th Cong., 2d Sess. 23 (1976). See also Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029 (1976). Section (j)(2) of the Privacy Act is no more particularized than was the statute at issue in Robertson. Moreover, the statutory language "any system of records" is certainly broader than the phrase "investigatory files . . . compiled for law enforcement purposes," which, as the Ninth Circuit has held, fails to meet the particularity requirements of Exemption 3 because it provides "insufficient specificity to take it out of the impermissible range of agency discretion to make decisions rightly belonging to the legislature." Church of Scientology v. United States Postal Service, 633 F.2d 1327, 1333 (9th Cir. 1980).

When Congress amended Exemption 3 in 1976, it intended to distinguish between those statutes which "in some manner told the official what to do about disclosure and those that did not significantly inform his discretion in that regard." American Jewish Congress v. Kreps, 574 F.2d 624, 629 (D.C. Cir. 1978) (emphasis in original). Section (j)(2) is not an Exemption 3 statute because "Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the public." Irons & Sears v. Dann, 606 F.2d 1215, 1219-20 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980) (footnote omitted). See also CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 121-22 n.18 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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Dated: December 6, 1983.

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2818 and 82-2819

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Plaintiffs-Appellants,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
Nos. 82 C 88 and 82 C 243—John C. Shabaz, *Judge.*

ARGUED SEPTEMBER 16, 1983—DECIDED NOVEMBER 16, 1983

Before BAUER, WOOD, *Circuit Judges*, and NEAHER,* *Senior District Judge.*

BAUER, *Circuit Judge.* Plaintiffs-appellants Shapiro and Wentz each were convicted in unrelated cases of violating 21 U.S.C. § 841 (1980), and both currently are serving prison terms. Shapiro and Wentz filed separate requests with the Drug Enforcement Administration (DEA) seeking access to their DEA files pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976)

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

(FOIA) and the Privacy Act, 5 U.S.C. § 552a (1975) (Privacy Act). The district court denied their requests on the ground that the records are exempt under Privacy Act Section (j)(2) (Exemption (j)(2)) and FOIA Section (b)(3) (Exemption 3). We affirm.

I. Background

In May 1981, Wentz filed a request with the DEA to obtain a copy of the DEA records pertaining to him; Shapiro made his request in October 1981. In April 1982, the DEA notified Wentz that all the documents he requested were in the DEA Investigative Reporting and Filing System and thus were exempt from access pursuant to Exemption (j)(2) of the Privacy Act and Exemption 3 of the FOIA. In June 1982, the DEA notified Shapiro that his request had been denied for the same reasons.

In March 1982, Wentz filed suit to compel release of the documents he had requested. Wentz later added a claim that the agency be required to correct allegedly inaccurate information in his files pursuant to the Privacy Act. Shapiro filed his suit in May 1982.

The district court consolidated the two cases because they raised identical issues. In October 1982, the district court granted the DEA's motions for summary judgment. The court held that the DEA had met the Privacy Act Exemption (j)(2) requirements by exempting these records from disclosure at 28 C.F.R. § 16.98(c). The district court also held that because the Privacy Act is a statute that exempts this information from disclosure, the information is exempt under FOIA Exemption 3 as well. Finally, the court held that since Privacy Act Exemption (j)(2) applies to the Act's correction provisions, Wentz's request for correction of the allegedly inaccurate records also must be denied.

II. Privacy Act Exemption (j)(2)

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, *see* 5 U.S.C. § 552a(d), and prevents the

release of such records to third parties without the consent of the individual except under specific instances, *see* 5 U.S.C. § 552a(b). The Privacy Act applies only to agency "records," which the Act defines as agency files or documents about individuals, contained in a "system of records," which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. *See* 5 U.S.C. §§ 552(a)(4) and (5).

An individual's right of access under the Privacy Act is not unlimited, however. Sections (j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under (j)(2), the head of an agency whose principal function is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

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[1] 5 U.S.C. § 552a(j)(2) provides:

> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
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> • • •
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement,

(Footnote continued on following page)

The DEA has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Investigative Reporting and Filing System from access to individuals.[2] The regulation justifies the exemption on the ground that access to such records would alert a subject to the existence of an investigation and thereby impede law enforcement efforts.[3] As the district court held, this explanation is sufficiently specific to satisfy the (j)(2) requirement that the regulation include reasons why the system is to be exempted.

Appellants' argument that this explanation renders the exemption inapplicable to them because they currently are imprisoned is without merit. First, the fact that appellants already have been convicted does not mean that the DEA is no longer investigating them. Moreover, Exemption (j)(2) does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly, as the DEA has done here.

The DEA supported its motion for summary judgment in each case with an affidavit by Russ Arslan, the chief of

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[1] *continued*

release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

The Act labels this a "general" exemption, as opposed to the "specific" exemptions at 5 U.S.C. § 552a(k).

[2] The regulation appears at 28 C.F.R. 16.98(c).

[3] 28 C.F.R. 16.98(d)(3).

the DEA's Freedom of Information Division. The affidavits stated that all references to Wentz and Shapiro are contained in criminal investigatory files that have been exempted according to published regulations.[4]

Wentz and Shapiro argue that the Arslan affidavits are insufficient. They contend that this court should require the DEA to prepare a *Vaughn* index of the requested documents, which would oblige the agency to "specify in detail which portions of the document are disclosable and which exempt." *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1977).

While courts mandate *Vaughn* indexing where an agency relies solely on an FOIA exemption to withhold information, the procedure does not apply to Exemption (j) of the Privacy Act. The FOIA exemptions are "specific" exemptions that apply only to individual documents; thus, courts require an indexed listing of the requested documents because "[w]hen the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id.* at 825. In contrast, Privacy Act Exemption (j) applies to whole systems of records. The only requirements are that the agency's principal function be law enforcement, that the system of records be compiled

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[4] Arslan's affidavit in Wentz's case states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 USC 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et. seq.

R. 14, at 3.

Arslan's affidavit in Shapiro's case is basically the same. See R. 7, at 2.

for the purpose of criminal investigation, and that the agency promulgate regulations exempting the system of records. As already noted, the DEA has met these requirements here. The Privacy Act requires nothing more from an agency seeking the (j)(2) exemption.[5] The district court thus properly held that the requested documents are exempt under the Privacy Act.

III. Freedom Of Information Act

Appellants Wentz and Shapiro next argue that they may obtain the requested records under the FOIA. Because their position conflicts with both the statutory language and legislative history of the FOIA and the Privacy Act, we affirm the district court's denial of access under the FOIA as well.

A. Background

Congress enacted the FOIA in 1966. The Act is a general disclosure statute whose purpose is to promote public access to federal government records. Just as the Privacy Act does not allow unlimited access to agency records, the FOIA contains exemptions that allow an agency to withhold records under certain circumstances; these nine "specific" exemptions are listed at 5 U.S.C. § 552(b).

Exemption 3, 5 U.S.C. § 552(b)(3), provides that the FOIA does not apply to information "specifically exempted" by other statutes.[6] The DEA has relied on Exemption

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[5] This conclusion is underscored by the Privacy Act's requirement of *de novo* review and possible *in camera* inspection if an agency invokes a Section (k) "specific" exemption. See 5 U.S.C. 552a(g)(3)(A). There is no such provision for agencies that seek the "general" exemptions in Section (j).

[6] 5 U.S.C. § 552(b)(3) provides:

> This section does not apply to matters that are—
>
> * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such

(Footnote continued on following page)

3 to deny appellants' request. It reasons that because the requested information is exempted from disclosure by the Privacy Act, the information also is unavailable under the FOIA. Wentz and Shapiro contend that the Privacy Act is not an Exemption 3 "statute," and thus the DEA may not use Exemption 3 to deny their request.

The district court held that the Privacy Act is a FOIA Exemption 3 statute. This holding is supported by our decision in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). In *Terkel*, we held that the FBI was not required to disclose documents under the FOIA that were exempt from release under Privacy Act Exemption (k): "Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Id.* at 216.

The Fifth Circuit also has held that requesters may not use the FOIA to avoid the Privacy Act nondisclosure provisions. In *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), the court specifically held that the Privacy Act is a FOIA Exemption 3 statute. Several recent district court decisions also have held that an agency may not be compelled to disclose information under the FOIA if that information is exempt from disclosure under the Privacy Act. *See Martin v. FBI*, No. 83 C 123 (N.D. Ill. Sept. 30, 1983); *Rachel v. Department of Justice*, No. 83 C 0434 (N.D. Ill. Aug. 1, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Anderson v. Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl v. Immigration and Natu-*

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* *continued*

statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

ralization Service, No. C-80-1210 (N.D. Cal. Dec. 17, 1981).

On the other hand, two circuit courts recently have held that the Privacy Act is not a FOIA Exemption 3 statute. *See Porter v. Department of Justice*, No. 82-1833 (3rd Cir. Sept. 15, 1983); *Provenzano v. Department of Justice*, No. 82-5681 (3rd Cir. Sept. 15, 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

Appellants urge us to reconsider our holding in *Terkel v. Kelley*, *supra*. Upon close examination of both the statutory language and relevant legislative history, we are persuaded to reaffirm our earlier decision. We hold that the district court correctly decided that the Privacy Act's nondisclosure provisions apply to FOIA requests under FOIA Exemption 3.

B. The Literal Requirements of FOIA Exemption 3

In order to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must "leave no discretion on the issue" of disclosure, or must establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." *See* 5 U.S.C. § 555(b)(3). Privacy Act Exemption (j)(2) clearly meets these requirements. First, its provisions specifically exempt the information requested here. Second, it describes the type of record to be withheld with sufficient specificity to meet the requirement that it refer to "particular types of matters to be withheld." Appellants' argument that Exemption (j)(2) vests too much discretion with the agencies is thus without merit.

Appellants contend that Congress still could not have intended the Privacy Act to be an Exemption 3 statute because nowhere in the legislative history of the Privacy Act or the 1976 proceedings that amended Exemption 3 did Congress refer to the Privacy Act as an Exemption 3 statute. This argument is also without merit, however, because appellants have not shown any congressional statement that the Privacy Act is *not* an Exemption 3 statute.

Rather, Congress set out specific criteria in Exemption 3, and the Privacy Act meets these requirements.

Appellants also argue that because Privacy Act exemption (j) exempts "any system of records within the agency from any part of *this* section" (emphasis added), it is limited to the Privacy Act itself, Section 552a. Yet this interpretation would allow a requester to bypass the Exemption (j) nondisclosure provision and seek the information through the FOIA instead. For reasons that we outline below in our discussion of Privacy Act Section (b)(2), this result is contrary to clearly stated congressional intent.

C. The Interrelationship of the Privacy Act and the Freedom of Information Act: Privacy Act Section (b)(2)

1. *Statutory Language*

In addition to the argument that the term "this section" at Exemption (j) renders the exemption inapplicable to the FOIA disclosure requirements, appellants contend that the Privacy Act Section (b)(2) specifically preserves the FOIA disclosure obligations. Section (b)(2) provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> * * *
>
> (2) required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b)(2).

Appellants argue that Section (b) is the provision designed to govern disclosure under the Privacy Act, and because Section (b) is not covered under Privacy Act Exemption (j),[7] Congress has exempted the FOIA disclosure

[7] *See supra* note 1.

requirements from Exemption (j).[8] For several reasons, however, we cannot accept this interpretation of the interrelationship of these two statutes. First, we disagree with appellants' reading of Section (b). The provisions of Section (b)(1)-(11) all require agency disclosure to a third party requester even though the individual to whom the record pertains has not consented to the disclosure. Yet the introductory language of Section (b) shows that the provisions of (b)(1)-(11) do not apply when the individual consents to disclosure. The language of this opening proviso shows that (b)(2) governs only third party requests for information; where the individual has made a first party request for information pertaining to himself, the FOIA exemption carved out at Section (b)(2) simply does not apply.[9] Section (d) provides sole access for first party requests under the Act.[10]

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[8] The court in *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), relied on this construction in reaching its conclusion.

[9] This conclusion is supported by the legislative history, which shows that Section (b)(2) was designed to protect third party access to agency records. *See* Subsection C, part 2 of text *infra*.

[10] 5 U.S.C. § 552a(d) provides in pertinent part:

> Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
>
> (2) permit the individual to request amendment of a record pertaining to him and—

(Footnote continued on following page)

2. *Legislative History*

Second, appellants' position would result in an emasculation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent. According to appellants' interpretation, any requester could use the FOIA to force an agency to disclose information even when that information is specifically exempt from disclosure under Exemption (j). The scope of Exemption (j) thus would be limited to the scope of any applicable FOIA exemptions. This limitation on Exemption (j) is contrary to the intent of Congress, however, as shown both by the exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act.

The legislative history reveals Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations. In its report on the Senate version of the Privacy Act, the Senate Government Operations Commit-

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[10] *continued*

> (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date or receipt of such request, acknowledge in writing such receipt; and
>
> (B) promptly, either—
>
> (i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
>
> (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;
>
> • • •

tee observed that law enforcement agencies often maintain files with "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity"; the report concluded that "it would not be appropriate to allow individuals to see their own intelligence or investigative files." S. Rep. No. 93-1183, 93d Cong., 2d Sess., at 23 (1974).

The House of Representatives Government Operations Committee report commented on the House version's exemption from disclosure for Central Intelligence Agency and criminal justice records and also concluded: "The Committee believes that such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. No. 93-1416, 93d Cong., 2d Sess., at 18 (1974). This congressional concern that first party requesters not be allowed to require agencies to disclose criminal justice records relating to them is supported by Representative Moorehead's explanation of the Privacy Act when the legislation was presented on the House floor: "[e]ach individual shall be given access to his record within the system on his request, with the exception of files related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, Source Book on Privacy 883 (1976) (hereinafter Source Book).

Appellants place great emphasis on the original Senate version of the Privacy bill, which contained a provision making the Act's nondisclosure provisions subject to other federal laws and regulations, *see* Section 205(b), S. 3418, Source Book at 143. This provision, they maintain, was included in the final compromise bill as Section (b)(2), and thus shows that Congress intended FOIA access to be unaffected by the Privacy Act nondisclosure provisions.

We cannot accept this interpretation of congressional intent. As noted above, in its final version Section (b)(2) is prefaced by an introductory proviso making it inap-

plicable where an individual requests access to his own records. Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q)[11] without any limiting provisos.[12]

Section (b)(2) apparently was included to guarantee that the access that the press and media enjoyed under the FOIA would not be curtailed by the Privacy Act. The Senate Report explained that an earlier version of Subsection (b)(2) was included in the Privacy bill "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* Source Book at 224.

In response to our conclusion that their interpretation would render Privacy Act Exemption (j) virtually meaningless, appellants contend that under their position Exemption (j) would retain some meaning because it would exempt agencies from other requirements of the Act not related to disclosure. For example, an agency

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[11] No agency shall rely on any exemption contained in section 552 [FOIA] of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

5 U.S.C. § 552(a)(q).

[12] The Fifth Circuit relied on this reasoning to hold that the Privacy Act is an Exemption 3 statute. *See Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

could rely on Exemption (j) to avoid many of the Section (e) requirements intended to insure that records are collected and maintained accurately. *See* 5 U.S.C. § 552a(e). *See also Greentree, supra*, 674 F.2d at 81.

Although Exemption (j) indeed specifically exempts agencies from complying with certain Privacy Act requirements besides disclosure, it also clearly exempts agencies from the disclosure provision, Section (d). Appellants' interpretation here is valid only if Section (b), to which Exemption (j) does not apply, covers both first party and third party requests. Since we are persuaded that Section (d) alone governs first party access, we must abide by the literal terms of Exemption (j) and hold that it exempts agencies from being required to disclose certain investigatory records to first party requesters.

Our conclusion is fortified by the legislative history of the Act. As we have noted, Congress expressed its concern that individuals not use the Act to gain access to sensitive criminal justice records. On the other hand, appellants have shown no examples of congressional concern that agencies be allowed to use the Privacy Act exemptions to avoid other Act requirements. We cannot ignore the clearly stated legislative intent and relegate the effect of the Act's exemptions to other provisions that apparently were less important to Congress.

Appellants also argue that various contemporary governmental interpretations of the Privacy Act contradict the government's current position. *See* OMB Report at 40 Fed. Reg. 56742-43 (1975); Justice Department Regulation at 28 C.F.R. 16.57. In response, the government notes that the Justice Department issued a letter several months after the Privacy Act was passed asserting that the Act was the exclusive avenue for first party requests, *see* Source Book at 1177-78, and that the OMB has proposed new guidelines stating that the Privacy Act is an Exemption 3 statute, *see* 48 Fed. Reg. 36359 (1983). These differing interpretations do not help us in our current task. Rather, they show only that government agen-

cies have been confused about the interrelationship between the Privacy Act and the FOIA.

In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

3. *Effect of Government's Construction: Full Meaning for Both Acts*

Whereas appellants' interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning. On the one hand, agencies could refuse first party requests for the type of information described in Exemption (j), as the DEA did here. At the same time, the FOIA still would retain its vitality. For example, although FOIA Exemption 7 allows greater access to law enforcement data than does Privacy Act Exemption (j) in some instances, the FOIA exemption applies in many cases where the Privacy Act's exemption does not.[13] Exemption 7 governs any

[13] FOIA Exemption 7 states that:

> (b) This section does not apply to matters that are—
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelli-

(Footnote continued on following page)

third party request, any request for documents that are not "records" within a "system of records," and any first party request for "records" that an agency has not exempted from access according to the Privacy Act's requirements.

Both appellants and the court in *Greentree*, *supra*, 674 F.2d at 79-80, note that the government's construction could result in a "third party anomaly." Because third party requests under the FOIA are protected from the Privacy Act's nondisclosure provisions by Privacy Act Section (b)(2), it is possible that a third party could have access to information about an individual that the individual himself could not obtain.

Merely showing that such an anomaly might exist, however, is not sufficient. The crucial question is whether Congress was aware of this possibility and drafted the Privacy Act to prevent it from occurring. The legislative history does not show that Congress was aware that this "third party anomaly" would arise. The floor managers of the Act explained the amendment that added Section (b)(2) to the Act as follows:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the *status quo as interpreted by the courts* regarding the disclosure of personal information under that section (the FOIA).

---

[13] *continued*

gence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

Source Book at 861 (Senator Ervin's explanation to Senate), 989 (Representative Moorehead's explanation to House) (emphasis added).

Under the "status quo as interpreted by the courts" at that time, third party requesters enjoyed few rights of access to records concerning other persons. The courts interpreted FOIA Exemption 6, which exempts certain files from access where disclosure would invade personal privacy, very broadly. *See, e.g., White Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Alliance v. U.S. Dept. of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the "status quo as interpreted by the courts" at that time.

Appellants also have not shown that even today the third party anomaly would arise more than rarely. As we have noted, many first party and third party requests will concern records that are not covered under the Privacy Act at all. Even where a record would be exempt from a first party request because of a Privacy Act exemption, FOIA Exemptions 6 and 7 likely would block the third party request as well.

D. Conclusion

A thorough examination of both the language of the FOIA and the Privacy Act and the relevant legislative history persuades us that the Privacy Act is a "statute" under FOIA Exemption 3. The district court properly held that because the records that Wentz and Shapiro seek are exempt from disclosure under the Privacy Act Exemption (j)(2), they may not be disclosed under a FOIA request. Since Exemption (j)(2) also covers requests for corrections, the denial of Wentz' request for correction of the allegedly inaccurate records also was proper.

Accordingly, the district court's decision granting the DEA's motion for summary judgment is affirmed.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

30

OCT [illegible]

82-C-88

82-C-88

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

MEMORANDUM AND ORDER

ALFRED B. SHAPIRO,

Plaintiff,

82-C-243

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

Before the Court are cross motions for summary judgment in the above named cases. Because the two cases raise identical issues and have been briefed in an almost identical fashion, these cases are consolidated for purposes of this order pursuant to Rule 42(a), Federal Rules of Civil Procedure.

The plaintiffs in these actions seek access to the records of the Drug Enforcement Agency which pertains to them. Disclosure of these records is sought pursuant to the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act, 5 U.S.C. §552a. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. §552(a)(4)(B) and 5 U.S.C. §552a(g)(1).

Each of the plaintiffs requested, pursuant to the Privacy Act, access to information within the control of the Drug Enforcement Agency ("DEA"). Wentz' request was made in May, 1981; Shapiro's in November, 1981. After these requests were

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perfected by the plaintiffs through the submission of identifying information, DEA denied access, basing the withholding of the information in the records on exemptions provided in the Privacy Act and in the Freedom of Information Act ("FOIA"). The specific exemptions relied upon were 5 U.S.C.§552(b)(3) and 5 U.S.C. §552a(j)(2).

Wentz received the determination to deny his request in April, 1982; Shapiro in June, 1982. While each of the plaintiffs seek access to their respective files, Wentz, in addition, seeks correction of assertedly incorrect information in the records which contain his name and also seeks damages under 5 U.S.C. §552a(g)(4). The information Wentz claims is incorrect concerns the component make-up and value of the controlled substance, possession of which led to his criminal conviction, and the statement in his pre-sentence report, apparently based on DEA records, that he had been involved with drugs for a number of years prior to his conviction.

Since the exemptions which the defendant claims apply to both disclosure and correction of incorrect information, 5 U.S.C. §552a(j), the Court will treat the claims of each plaintiff identically. The plaintiffs have relied on each other's briefs and the defendant has filed virtually identical briefs on the issues raised by the summary judgment motions.

MEMORANDUM

Defendants rely on the exemption provisions of the FOIA and the Privacy Act for the proposition that any information contained in systems of records compiled for investigatory law enforcement purposes is exempt from disclosure. The applicable parts of the exemption statutes are as follows:

5 U.S.C. §552(b)

(b) This section does not apply to matters that are --

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. §552a(j)

(j) General exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

As it concerns the exemptions in FOIA at §552(b)(3), it is clear that the Privacy Act is a "statute" which explicitly exempts certain information from disclosure. Painter v. Federal Bureau of Investigation, 615 F.2d 689 (5th Cir. 1980). The Privacy Act, designed as it was to protect individuals from government disclosure of information about them, must be read in such a way despite plaintiffs' assertions to the contrary. Thus, plaintiffs' right to access to the records involved here must rise or fall on the Privacy Act alone.

The Privacy Act exemption relied upon by defendant requires that rules be promulgated, naming the systems of records exempted under the provisions under §552a(j). The DEA has done so at 28 C.F.R. §16.98. The affidavit of Russ Arslan, filed on behalf of the defendant in support of its summary judgment motions, states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 U.S.C. 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 C.F.R. 16.98 et.seq.[1]

The defendant reads §552a(j) to create a blanket exemption from disclosure for systems of records maintained by DEA, an agency which is obviously one which "performs as its principal function any activity pertaining to the enforcement of criminal laws . . ." It also seems clear that defendant is relying on subsections (j)(2)(B) and (C) to support the scope of the exemption claimed in these cases. According to the Arslan affidavit, all of the references to the plaintiffs appear in records subject to the (j)(2) exemption. It is therefore apparent that the systems of records which contain references to plaintiffs must be included in that list of systems at 28 C.F.R. §16.98(c). These are the only ones which are based on the (j)(2) exemption. Plaintiffs' assertions that DEA cannot depend on the (j)(2) exemption for systems listed in 28 C.F.R. §16.98(a) are correct but irrelevant because a necessary implication from the affidavit language quoted above is that the systems listed in (a)(3) are not involved.

The Court must conclude that the blanket exemption claimed by the DEA is correct. The systems involved are listed in the regulations and the reasons for the exemptions are listed with sufficient specificity to accomplish the purpose of the statute

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[1] This statement was contained in Arslan's affidavit filed in plaintiff Wentz's action. It is virtually identical to that filed in Shapiro's action.

which required promulgation of the regulations. The arguments raised by plaintiffs have considerable force but must be rejected because of the rather sweeping language of the statute in question, §552a(j)(2). The DEA has done what the statute requires and is entitled to the exemption for the systems of records listed at 28 C.F.R. §16.98(c).

See also: Nunez v. Drug Enforcement Administration, 497 F.Supp. 209 (S.D.N.Y. 1980) (records sought relating to DEA law enforcement activities not accessible pursuant to 5 U.S.C. §552a(j)(2); Greentree v. U.S. Customs Service, 515 F.Supp. 1145 (D.C.D.C. 1981) (the Privacy Act exemption statute is a "statute" within the meaning of 5 U.S.C. §552(b)(3).

Plaintiff Wentz' claims concerning the incorrect information in the records is, as the Court has mentioned, subject to the same exemptions that have been properly raised by defendant as it concerns disclosure. Thus, the amendment to the complaint must fall on the summary judgment motion along with the claims in the original complaint. See Varona Pacheco v. Federal Bureau of Investigation, 456 F.Supp. 1024, 1034, (D.C.Puerto Rico 1978) (exemption provisions of the Privacy Act apply to correction provisions of the Act as well as to the disclosure provisions). This does not mean that plaintiff does not have a right to have accurate information before those who will make decisions concerning his sentence and parole. It only means that the forum for challenging the information is not an action under the Privacy Act.

Accordingly,

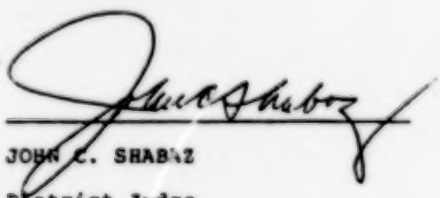
ORDER

IT IS ORDERED that plaintiffs' motions for summary judgment are DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment, as they concern the complaints and amendments, are GRANTED.

Entered this 6th day of October, 1982.

BY THE COURT:



JOHN C. SHABAZ
District Judge

APPENDIX C

Opinion by Judge Bauer
JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

17

November 16, 1983.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. EDWARD R. NEAHER, Senior District Judge*

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
Plaintiffs-Appellants.

Nos. 82-2818 and 82-2819 vs.

DRUG ENFORCEMENT ADMINISTRATION,
Defendant-Appellee,

Appeals from the United State District Dourt for the Western District of Wisconsin

Nos. 82-C-88 and 81-C-243
John C. Shabaz, Judge.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

APPENDIX D

CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

31

OCT 8 1982

82-C-88

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO.

GREGORY J. WENTZ,

Plaintiff,

vs.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

Dated at Madison, Wisconsin, this day of October, 1982.

Joseph W. Skupniewitz
Clerk of Court

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EARSA Enquiries
this 8th day of Oct 1982
By D. Hahn
Deputy Clerk

APPENDIX E

CIV 33
(7/63)

JUDGMENT ON DECISION BY THE COURT

14

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

OCT 8 1982

82-C-243

CIVIL ACTION FILE NO.

ALFRED B. SHAPIRO,

Plaintiff,

vs.

DRUG ENFORCEMENT AGENCY,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

Dated at Madison, Wisconsin, this 8th day of October, 1982.

Joseph W. Skupniewitz
Clerk of Court

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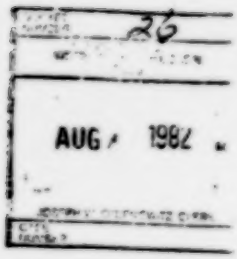
this 8th day of Oct 1982

By S. Hadar
Deputy Clerk

APPENDIX F



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-88

The Court is in receipt of plaintiff's cross motion for summary judgment; plaintiff's motion for detailed justification, itemization and indexing under Vaughn v. Rosen, 484 F.2d 820, cert. denied 415 U.S. 977 (1974); plaintiff's amended complaint; and a letter from defendant asserting that plaintiff's response to defendant's summary judgment motion is untimely with a request that judgment for defendant be entered or, in the alternative, that an extension be granted for reply to plaintiff's response.

Plaintiff was granted an extension to respond to defendant's motion for summary judgment motion to July 19, 1982, by order dated July 2, 1982. Plaintiff subsequently informed the court that he would have difficulty meeting that deadline. His response was received on July 27, 1982. The Court is convinced that this pro se plaintiff has been diligent in complying with the court's order considering the relative legal complexity of the issue being briefed. The Court will not, therefore, entertain a motion to dismiss for failure to prosecute even if the defendant makes a proper motion.

Plaintiff's amended complaint will be accepted. Defendant has made no objection to it and it appears that defendant reasonably anticipated plaintiff's action in this regard.

1

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By J. Hahn Deputy Clerk

Plaintiff's motion under Vaughn v. Rosen will be denied at this time pending receipt of defendant's reply brief. If the court is convinced at that time that a ruling on this motion is necessary for decision on the summary judgment motions, the court will reconsider the denial and give defendant an opportunity to respond to the motion.

Defendant's request for thirty (30) days to reply to plaintiff's response and cross motion would seem to be justified in that plaintiff has expanded his complaint to include a claim that the information in his DEA file is inaccurate. However, the court must take notice of the burden on plaintiff as it concerns the inaccuracy of the information and the proof required to show wilful and intentional dissemination of such information. These burdens have clearly not been met at this stage because the government has not as yet answered concerning the claim much less admitted wilful and intentional wrongdoing. Thus summary judgment connot be granted on the claim under 5 U.S.C. §552a(g)(1)(C) because of the existence of factual disputes.

Accordingly, defendant need not reply to that portion of plaintiff's brief directed at inaccuracy of the records. The reply should be directed only at that portion of the brief which responds to plaintiff's right to access. The time given in the order below should be adequate.

Plainitff has renewed his request for appointment of counsel. The request is denied for the reasons stated in the court's previous order. In accordance with Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981), the Court finds that the factual and legal issues involved are not so complex as to require the appointment of counsel. This is particularly true in this case. Plaintiff has shown a more than adequate ability to pursue his claim pro se.

ORDER

IT IS ORDERED that plaintiff's request for leave to file an amended complaint is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for appointment of counsel is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for detailed justification, itemization and indexing under Vaughn v. Rosen is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment only as it concerns his claim under 5 U.S.C. §552a(g)(1)(C) is DENIED.

IT IS FURTHER ORDERED that defendant's reply brief is due on August 20, 1982.

Entered this 3rd day of August, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX G

16

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

NOV 1 - 1982

82-C-243

ALFRED B. SHAPIRO,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-243

Plaintiff Alfred B. Shapiro has filed a motion for leave to proceed in forma pauperis on appeal.

Rule 24(a), Federal Rules of Appellate Procedure, provides in part:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing . . . his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

28 U.S.C. Section 1915(a) provides in part:

> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Good faith in this context means that the issues on appeal are not frivolous. See Coppedge v. United States, 369 U.S. 438, 445 (1961); Linden v. Harper & Row, Inc., 467 F.Supp. 566 (S.D.N.Y. 1979).

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By J. Richter
Deputy Clerk

Although this Court ordinarily requires a statement of issues to be litigated on appeal, the record of this case indicates rather clearly what action of this Court has aggrieved the plaintiff. That is whether the Freedom of Information Act and Privacy Act, 5 U.S.C. §552 and 5 U.S.C. §552a respectively, require disclosure of the items sought by plaintiff from the Drug Enforcement Agency. Since the plaintiff raised an issue which was not easily resolved, the Court finds that this appeal is taken in good faith and grants the motion to proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is GRANTED.

Entered this 12th day of November, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

33

NOV 1 6 1982

GREGORY J. WENTZ,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant.

ORDER

82-C-88

Plaintiff Gregory J. Wentz has filed a motion for leave to proceed in forma pauperis on appeal.

Rule 24(a), Federal Rules of Appellate Procedure, provides in part:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing . . . his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

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Although this Court ordinarily requires a statement of issues to be litigated on appeal, the record of this case indicates rather clearly what action of this Court has aggrieved

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By S. Rustan
Deputy Clerk

the plaintiff. That is whether the Freedom of Information Act and Privacy Act, 5 U.S.C. §552 and 5 U.S.C. §552a respectively, require disclosure of the items sought by plaintiff from the Drug Enforcement Agency. Since the plaintiff raised an issue which was not easily resolved, the Court finds that this appeal is taken in good faith and grants the motion to proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is GRANTED.

Entered this 12th day of November, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX I
STATUTES INVOLVED

United States Code, Title 5:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(b) This section does not apply to matters that are -

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose

the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

* * *

§ 552a. Records maintained on individuals

(a) Definitions

* * *

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

* * *

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

* * *

(2) required under section 552 of this title;

* * *

(d) Access to records

Each agency that maintains a system of records shall -

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and -

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either -

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly

note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements

Each agency that maintains a system of records shall -

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include-

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable erforts to assure that such records are accurate, complete? timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm,

embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragragh (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

* * *

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (3)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is -

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

* * *

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

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ORIGINAL

No. 83-5878

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ALFRED B. SHAPIRO and GREGORY J. WENTZ, PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ, PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO
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MEMORANDUM FOR THE RESPONDENT

Petitioners contend that an individual who is barred from access to his agency records under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), may nevertheless obtain disclosure of those records under the Freedom of Information Act.

1. Petitioners were each convicted, in unrelated cases, of violating the controlled substances laws, specifically 21 U.S.C. 841. While they were serving their respective sentences, petitioners filed separate requests with the Drug Enforcement Administration seeking access to their files pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a. Pet. App. 1a-2a. The DEA denied the requests on the ground that all of the documents sought are contained within systems of criminal justice records that are exempt from access pursuant to regulations promulgated under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2). See

28 C.F.R. 16.98. The DEA further asserted that Privacy Act Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3 (5 U.S.C. 552(b)(3)), and that therefore the relevant records are also exempt from disclosure under the FOIA. Pet. App. 2a.

Petitioners filed separate actions in the United States District Court for the Western District of Wisconsin, seeking an order compelling the DEA to release their respective records. The district court consolidated the two cases for purposes of decision and upheld the agency's denial of the requests (Pet. App. 19a-24a).

The court of appeals affirmed (Pet. App. 1a-18a; 721 F.2d 215). The court held that the records sought by petitioners had been properly exempted from access by agency regulation pursuant to Privacy Act Exemption (j)(2) (Pet. App. 2a-6a). In addition, the court concluded that Exemption (j)(2) is a FOIA Exemption 3 statute (Pet. App. 6a-17a). Thus, the court ruled that the records at issue may be withheld under both the Privacy Act and the FOIA. In reaching this result, the court recognized (Pet. App. 7a-8a) that its holding is consistent with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980), but is in conflict with the decisions of two other circuits. Provenzano v. United States Department of Justice, 717 F.2d 799 (3d Cir. 1983), petition for cert. pending, No. 83-1045; Porter v. United States Department of Justice, 717 F.2d 787 (3d Cir. 1983); Greentree v. United States Customs Service, 674 F.2d 74 (D.C. Cir. 1982).

2. Petitioners contend that Exemption (j)(2) of the Privacy Act is not a withholding statute within the meaning of FOIA Exemption 3. We agree with petitioners that this question, as to which there is a conflict among the circuits, warrants review by this Court. We therefore have filed a petition for a writ of certiorari seeking review of this question in United States

Department of Justice v. Provenzano, No. 83-1045.1/ Accordingly we suggest that the Court defer disposition of the instant petition pending its disposition of our petition in Provenzano.2/

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition of the petition for certiorari in United States Department of Justice v. Provenzano, No. 83-1045.

REX E. LEE
Solicitor General

MARCH 1984

1/ We have sent petitioners' counsel a copy of our petition in Provenzano.

2/ Although the questions presented in the two cases are identical, there is a substantial reason why it would be appropriate to hold this case pending a decision in Provenzano. We note, pursuant to Rule 46.5 of the Rules of this Court, that there is some question whether one of petitioners is entitled to proceed in forma pauperis. In the papers supporting his request to proceed in forma pauperis, petitioner Shapiro indicates that he is employed and earns $1,500 per month. Because this means that Shapiro earns $18,000 per year, it is most unlikely that he meets the standard for proceeding in forma pauperis set out in 28 U.S.C. 1915. See Adkins v. DuPont, 335 U.S. 331, 339 (1948). See also, e.g., Brown v. Herald Co., Inc., No. 82-6778 (Oct. 31, 1983) (denying motion for leave to proceed in forma pauperis); Garcia v. United States, No. 82-5934 (June 13, 1983) (same). Any uncertainty regarding Shapiro's right to proceed in forma pauperis should be clarified while the issue common to these cases is resolved in Provenzano.

ORIGINAL

No. 83-5878

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
Petitioners,

vs.

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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March 12, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
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DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners Alfred B. Shapiro and Gregory J. Wentz respectfully submit this reply memorandum in response to the memorandum of respondent Drug Enforcement Administration and in further support of their petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

1. The Solicitor General concedes that the issues upon which petitioners seek review are important questions of federal law, upon which there is a conflict among the circuits, and which clearly warrant review by this Court (Mem. 2). Indeed, as the Solicitor General notes (Mem. 2-3), approximately two weeks after the instant petition was docketed, the government filed its own petition for a writ of certiorari in United States Department of Justice v. Anthony Provenzano, No. 83-1045.[1/] As the Solicitor General

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1/ The government's petition for rehearing and suggestion for rehearing en banc in Provenzano were denied by the Third Circuit on November 10, 1983. The petition for a writ of certiorari in the instant case was docketed in this Court on December 8, 1983. The government's petition for a writ of certiorari in Provenzano was filed on December 23, 1983.

observes, "the questions presented in the two cases are identical" (Mem. 3 n.2).

2. After conceding that the issues presented by petitioners are worthy of review, and noting that the government has filed a petition raising "identical issues," the Solicitor General states: "Accordingly, we suggest that the Court should defer disposition of the instant petition pending its disposition of our petition in Provenzano" (Mem. 3; footnote omitted). The logic of the Solicitor General's suggestion is far from obvious. While asking that the Court give preference to the government's petition in Provenzano, the Solicitor General does not point to a single substantive or procedural difference between the two cases to suggest that Provenzano might be a better vehicle for Supreme Court review. Indeed, the Solicitor General's suggestion confounds common sense. One would assume that if only one of two petitions raising identical issues is to be granted, the petition to be granted would be the petition that was filed first. Cf. R. Stern & E. Gressman, Supreme Court Practice 297, 360-65 (5th ed. 1978).

3. Having failed to find any persuasive basis for distinguishing the two cases, despite having had 90 days in which to file a response to the petition in the instant case, the Solicitor General asserts in a footnote that "there is some question whether one of the petitioners [in the instant case] is entitled to proceed in forma pauperis" (Mem. 3 n. 2; emphasis added), and therefore suggests that "[a]ny uncertainty regarding Shapiro's right to proceed in forma pauperis should be clarified while the issue common to these cases is resolved in Provenzano" (ibid.). There is no merit to this suggestion.

First, the Solicitor General does not question the entitlement of Mr. Wentz to proceed in forma pauperis,

and the vindication of Mr. Wentz's substantive rights surely should not be delayed simply because the Solicitor General has raised a question concerning Mr. Shapiro's entitlement to so proceed.

Second, the suggestion with respect to Mr. Shapiro is ill-founded in any event. As Mr. Shapiro's affidavit shows, his total assets at the time the petition was filed consisted of a checking account balance of $314. It is manifest that Mr. Shapiro, who had only recently been released from custody, could not have paid for the printing of his petition, let alone the docketing fee.[2/]

The government's unrealistic and cramped analysis of Mr. Shapiro's affidavit is precisely the approach that the Court disapproved in Adkins v. DuPont Co., 355 U.S. 331 (1948), upon which the government purports to rely (Mem. 3 n. 2). Moreover, the government does not explain why it was necessary to take 90 days to raise this question, which is admittedly the only issue raised in its memorandum.[3/] Nor does the government suggest why it is now necessary for

---

2/ The government asserts, however, that Mr. Shapiro should not be allowed to proceed in forma pauperis because he currently earns $1500 per month. To make this gross monthly income sound more substantial, the government assumes that Mr. Shapiro will continue to be employed at this amount, and thus states that Mr. Shapiro earns $18,000 per year. Even assuming Mr. Shapiro's continued employment and salary, the import of the government's argument is that Mr. Shapiro -- who is being represented by court-appointed counsel, has virtually no assets, and has two children to support -- should not be allowed to vindicate his rights unless he is willing to devote an amount equal to perhaps two or three months' gross income to the payment of the costs that would necessarily be incurred in the printing of briefs in this case. How Mr. Shapiro, with virtually no assets to begin with, is to accumulate that surplus in time to pay his printing bills is a question that remains unanswered in the government's footnote.

3/ Despite the fact that Mr. Shapiro's motion for leave to proceed in forma pauperis was filed more than three months ago, and counsel for petitioners has had several telephone conversations with government counsel since that time, the alleged issue of Mr. Shapiro's entitlement to proceed in forma pauperis had never been raised prior to the filing of the government's memorandum.

this Court to press forward with its consideration of Provenzano, while deferring action on the petition in the instant case. Only a month ago, when the Solicitor General asked the Court for an extension of time so that he could receive the brief in opposition in Provenzano prior to submitting his response to the instant petition (thus reversing the natural chronology of the two cases), he supported his request by noting that the instant case "would not be scheduled for argument this Term in any event" (Letter of February 3, 1984). The same is now true of Provenzano. One must conclude from these facts that the raising of this issue at this time is merely an attempt to gain some perceived tactical advantage.

4. Since the government has raised no question concerning Mr. Wentz's motion for leave to proceed in forma pauperis, that motion should be allowed and the petition for a writ of certiorari should be granted. In addition, the government has raised no question of substance concerning Mr. Shapiro's motion, which should also be allowed.

It is respectfully submitted that the petition for a writ of certiorari should be granted and the case set down for oral argument.

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Barry Sullivan*
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Chicago, Illinois 60611
(312) 222-9350
Attorneys for Petitioners

*Counsel of record

Dated: March 12, 1984

FILED
MAY 22 1984
ALEXANDER L. STEVAS
CLERK

No. 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS,

v.

DRUG ENFORCEMENT ADMINISTRATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 8, 1983.
CERTIORARI GRANTED APRIL 2, 1984.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
3/11/82	Complaint filed in *Wentz v. Drug Enforcement Administration*, 82 C 88 (W.D. Wis.)
4/28/82	Complaint filed in *Shapiro v. Drug Enforcement Administration*, 82 C 243 (W.D. Wis.)
6/11/82	Defendant's Motion to Dismiss or for Summary Judgment and Memorandum in Support filed in *Wentz*
6/25/82	Affidavit of Russ Arslan filed by Defendant *Wentz*
7/06/82	Defendant's Motion to Dismiss or for Summary Judgment filed in *Shapiro*
7/27/82	Plaintiff's Cross-Motion for Summary Judgment, Memorandum in Support, and Affidavit of Gregory J. Wentz filed in *Wentz*
7/27/82	Plaintiff's Motion under *Vaughn v. Rosen* and Memorandum in Support filed in *Wentz*
7/27/82	Plaintiff's Amended Complaint filed in *Wentz*
8/04/82	Order and Opinion of the United States District Court for the Western District of Wisconsin denying Plaintiff's Motion under *Vaughn v. Rosen* filed in *Wentz*
8/06/82	Memorandum in Support of Motion to Dismiss or for Summary Judgment and Affidavit of Russ Arslan filed by Defendant in *Shapiro*
8/24/82	Defendant's Reply Brief filed in *Wentz*
8/27/82	Plaintiff's Cross-Motion for Summary Judgment and Memorandum in Support filed in *Shapiro*
8/27/82	Plaintiff's Motion under *Vaughn v. Rosen* filed in *Shapiro*
9/15/82	Plaintiff's Supplementary Memorandum filed in *Wentz*

DATE	FILINGS—PROCEEDINGS
10/08/82	Opinion and Judgment granting Defendant's Motions for Summary Judgment filed in *Wentz* and *Shapiro*
11/04/82	Plaintiffs' Notices of Appeal filed in *Wentz* and *Shapiro*
11/16/83	Opinion and Judgment filed by the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82 C 88

GREGORY J. WENTZ

vs.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Mar. 11, 1982]

COMPLAINT UNDER PRIVACY ACT

The complaint of Gregory J. Wentz, who resides in Adams County, Wisconsin, respectfully represents:

1.

This Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. 552a(g)(1) and 28 U.S.C. 1331.

2.

Made defendant herein is the Drug Enforcement Administration of the United States Department of Justice, an "agency" under the provisions of 5 U.S.C. 552a(a)(1) and 5 U.S.C. 552e.

3.

In or prior to September of 1980 the Drug Enforcement Administration initiated an investigation of Complainant which resulted in his arrest and conviction of various criminal violations of Title 21 of the United States Code.

4.

During the course of that investigation the Drug Enforcement Administration compiled an extensive file on the Complainant.

5.

Commencing on May 29, 1981, Complainant has made numerous requests of the Drug Enforcement Administration for disclosure of his investigative file and all other information concerning him that might be in the custody of that Agency.

6.

Complainant has provided the Agency with all information and documents it has demanded for the purpose of complying with his request.

7.

Despite Complainant's repeated requests and cooperation, the Agency has provided no documents or records whatsoever to Complainant.

8.

The Drug Enforcement Administration has not claimed or asserted that any of the records or documents sought are subject to the exemption provisions of the Privacy Act and the Freedom of Information Act.

9.

Complainant is entitled to a permanent injunction under the provisions of 5 U.S.C. 552a(g)(3)(A) and F.R.C.P. 65, enjoining the Agency from withholding the documents or records and ordering the production of such documents or records to Complainant.

10.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Complainant under the provisions of 5 U.S.C. 552a(g)(3)(B).

11.

Complainant is incarcerated in the Federal Correctional Institution at Oxford, Wisconsin, and is without means to

pay any costs of court in advance or as they accrue, or to furnish security therefor or to retain an attorney to represent him in these proceedings and therefore, requests that the Court appoint an attorney to represent him and allow him to litigate this civil action in forma pauperis. An Affidavit of Indigency is attached hereto and made a part hereof.

WHEREFORE, Complainant prays:

I. That a permanent injunction issue herein enjoining the Drug Enforcement Administration from withholding all records and documents pertaining in any way to Complainant, Gregory J. Wentz, and ordering the production of such records and documents to him;

II. That there be a judgment herein assessing all costs of this civil action against the United States and awarding the Complainant reasonable attorney's fees for the prosecution of this action;

III. That an order issue herein granting Complainant permission to litigate this civil action without payment of the costs of court in advance, or as they accrue or furnishing security therefor and appointing an attorney at law to represent the Complainant in this matter.

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
P.O. Box 1000
Oxford, Wisconsin 53952

GREGORY J. WENTZ, being first duly sworn, deposes and says that he has written the above and foregoing *Complaint under Privacy Act*, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ Gregory J. Wentz
GREGORY J. WENTZ, pro se

Subscribed and sworn to before me this 18th day of January, 1982, at Oxford, Wisconsin.

/s/ Annette B. Kittmann
Notary Public

[SEAL]

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82 C 243

ALFRED B. SHAPIRO

vs.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Apr. 28, 1982]

COMPLAINT UNDER PRIVACY ACT

The Complaint of Alfred B. Shapiro, who resides in Adams County, Wisconsin, respectfully represents:

1.

This Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. 552a(g)(1) and 28 U.S.C. 1331.

2.

Made defendant herein is the Drug Enforcement Administration of the United States Department of Justice, an "agency" under the provisions of 5 U.S.C. 552a(a)(1) and 5 U.S.C. 552e.

3.

In or prior to August of 1980 the Drug Enforcement Administration initiated an investigation of Complainant which resulted in his arrest and conviction of various criminal violations of Title 21 of the United States Code.

4.

During the course of that investigation the Drug Enforcement Administration compiled an extensive file on Complainant.

5.

Commencing in October of 1981, Complainant has made numerous requests of the Drug Enforcement Administration for disclosure of his investigative file and all other information concerning him that might be in the custody of that agency.

6.

Complainant has provided the agency with all information and documents it has demanded for the purpose of complying with his request.

7.

Despite Complainant's repeated requests and cooperation, the agency has provided no documents or records whatsoever to Complainant.

8.

The Drug Enforcement Administration has not claimed or asserted that any of the records or documents sought are subject to the exemption provisions of the Privacy Act and the Freedom of Information Act.

9.

Complainant is entitled to a permanent injunction under the provisions of 5 U.S.C. 552a(g)(3)(A) and F.R.C.P. 65, enjoining the agency from withholding the documents or records and ordering the production of such documents or records to Complainant.

10.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Complainant under the provisions of 5 U.S.C. 552a(g)(3)(B).

11.

Complainant is incarcerated in the Federal Correctional Institution at Oxford, Wisconsin and is without means to

pay any costs of court in advance or as they accrue or to furnish security therefor and requests that the Court allow him to litigate this civil action in forma pauperis. An affidavit of indigency is attached hereto and made a part hereof.

WHEREFORE, Complainant prays:

I. That a permanent injunction issue herein enjoining the Drug Enforcement Administration from withholding all records and documents pertaining in any way to Complainant, Alfred B. Shapiro, and ordering the production of such records and documents to him;

II. That there be judgment herein assessing all costs of this civil action against the United States and awarding the Complainant reasonable attorney's fees for the prosecution of this action;

III. That an order issue herein granting Complainant permission to litigate this civil action without payment of the costs of court in advance, or as they accrue or furnishing security therefor.

/s/ Alfred B. Shapiro
ALFRED B. SHAPIRO
05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action #82-C-88

GREGORY J. WENTZ, PLAINTIFF

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT

[Filed Jun. 25, 1982]

AFFIDAVIT OF RUSS ARSLAN

I, Russ Arslan, being duly sworn, depose and say as follows:

1. I am the Chief of the Freedom of Information Division of the Drug Enforcement Administration (DEA). As such, I am officially responsible for initially granting or denying requests made pursuant to the Freedom of Information/Privacy Acts (FOIA/PA), as amended (5 USC 552 and 5 USC 552a), respectively.

2. I am familiar with the complaint filed by the Plaintiff in which the Plaintiff made a request, pursuant to the Freedom of Information Act, that DEA disclose certain documents.

3. By letter dated May 29, 1981, pursuant to the provisions of the Freedom of Information and Privacy Act, the Plaintiff requested ". . . a copy of my entire DEA file, most especially the information compiled during the investigation initiated in September, 1980, primarily in the state of North Dakota." A true and correct copy of the Plaintiff's letter of May 29, 1981 is attached hereto as Exhibit A.

4. By letter dated June 8, 1981, DEA informed the Plaintiff that his request had been assigned Deficient Request number, DR-1-207-P, and further that the requester's complete name and date and place of birth must be furnished to ensure an accurate search of DEA records. A true and correct copy of DEA's letter of June 8, 1981, is attached hereto as Exhibit B.

5. By letter dated June 11, 1981, the Plaintiff forwarded a complete copy of an Identity Verification form along with his Social Security number to DEA. A true and correct copy of the Plaintiff's June 11, 1981, letter is attached hereto as Exhibit C.

6. By letter (and attachment) dated July 28, 1981, to the DEA Office, Fargo, North Dakota, the Plaintiff informed DEA of his desire for access to certain specific documents (which if in existence, would be discovered during the search pursuant to his May 29, 1981, request). A true and correct copy of the Plaintiff's July 28, 1981 letter is attached hereto as Exhibit D.

7. By letter dated August 27, 1981, the Plaintiff informed DEA of alleged non-action regarding the Plaintiff's request to the DEA Office in Fargo, North Dakota. A true and correct copy of the Plaintiff's August 27, 1981 letter is attached hereto as Exhibit E.

8. By letter dated August 18, 1981, the Plaintiff informed DEA that "It is now nine weeks since I complied with your request for identification and I have not received the information I requested." A true and correct copy of the Plaintiff's August 18, 1981 letter is attached hereto as Exhibit F.

9. By letter dated September 10, 1981, DEA informed the Plaintiff that his request will be handled in chronological order based on the date of its receipt. In addition, DEA assigned the Plaintiff's request number 81-802-P. A true and correct copy of DEA's letter of September 10, 1981, is attached hereto as Exhibit G.

10. By memorandum dated November 24, 1981, the Executive Office for United States Attorneys (EXOUSA) forwarded the Plaintiff's June 16, 1981 request to the EXOUSA and 46 pages of DEA criminal investigative reports containing information about the Plaintiff to DEA. A true and correct copy of the EXOUSA's memo of November 24, 1981, is attached hereto as Exhibit H.

11. By letter dated December 16, 1981, DEA informed the Plaintiff that the EXOUSA had located documents originated by DEA while processing the Plaintiff request to the EXOUSA, and that these documents were forwarded to DEA. A true and correct copy of DEA's letter of December 16, 1981, is attached hereto as Exhibit I.

12. On March 17, 1982, a Complaint and Summons were filed with the U.S. District Court for the Western District of Minnesota regarding the Plaintiff's request. A copy of the Summons and Complaint were received by DEA's Freedom of Information Division on March 23, 1982.

13. By letter dated April 19, 1982, the Plaintiff was notified that the search for all the documents relating to him had been completed and the Defendant further advised the Plaintiff that there were no documents available to him because of the restrictive provisions of the Privacy Act of 1974. A true and correct copy of the Defendant's April 19, 1982, letter is attached hereto as Exhibit J.

14. I have reviewed the Plaintiff's May 29, 1981, request and have decided that the Privacy Act prohibitions relied upon in DEA's determination letter of April 19, 1982, are applicable in response to the Plaintiff's request. Any reference to the Plaintiff, which may be responsive to the request, cannot be released.

15. I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j) (2) of the Privacy Act (5 USC 552a) and

further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et seq.

16. Accordingly all references to the Plaintiff have been properly withheld pursuant to the Privacy Act 5 USC 552a exemption (j)(2) and to the Freedom of Information Act, 5 USC 552 exemption (b)(3).

17. It is unnecessary to provide the Plaintiff with a detailed justification of each and every additional FOI exemption that may be applicable on the basis that the (j)(2) exemption and the (b)(3) exemption are first and foremost categorically restrictive statutes prohibiting disclosure and therefore reference to the Plaintiff are not subject to discretionary release.

18. The subject of this Affidavit and the statements set forth herein are within my official purview and are true and correct to the best of my information, knowledge and belief.

/s/ Russ Arslan
RUSS ARSLAN
Chief
Freedom of Information Division
Drug Enforcement Administration
Department of Justice

Sworn and subscribed to before me this 22nd day of April, 1982.

/s/ Katherine L. Webster
Notary Public

My Commission Expires January 14, 1987

[SEAL]

EXHIBIT A

P.O. BOX 1000
Oxford, WI. 53952
29 May 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

Re: Privacy Act Request

Dear Sir:

Under the provisions of the Privacy Act of 1974, 5 U.S.C. 522a, and the Freedom of Information Act, 5 U.S.C. 522, I hereby request a copy of my entire D.E.A. file, most especially the information compiled during the investigation initiated in September, 1980, primarily in the state of North Dakota.

If there are any fees for copying the records I am requesting, I ask that the agency grant me a waiver of fees based on my indigent status.

If all or any part of this request is denied, please cite the specific exemption(s) which you think justifies your refusal to release information. Also, please inform me of your agency's appeal procedure.

In order to expedite consideration of my request, my signature to this letter will be notarized by an officer of the Federal Correctional Institute at Oxford, WI.

It is my understanding Executive branch guidelines for implementation of Privacy Act provisions are acknowledgement of receipt of request within 10 working days, herein included an indication as to whether the request will be granted and, if so, when and where. From that point it is further my understanding that records will be produced within 30 working days. And if this is not

possible, the agency will advise me when it anticipates the request will be granted.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
F.C.I. OXFORD, WI. 53952

/s/ Elizabeth Roeker
E. ROEKER
Parole Officer
Federal Correctional Institution
Oxford, Wisconsin 53952
"Authorized by the act of July 7, 1955
to administer oaths (18 U.S.C. 400.4)."

cc/ Sen Edward Kennedy, Senate Judiciary Committee
Sen Joseph Biden
Rep Byron Dorgan
U.S. Dist. Judge Paul Benson

EXHIBIT B

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
Jun 08 1981
Washington, D.C. 20537

Mr. Gregory J. Wentz
#04260-059
P.O. Box 1000
Oxford, WI 53952

Dear Mr. Wentz:

Re: DEA-DR-1-207-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

To ensure an accurate search of DEA records, an individual's complete name, date, and place of birth must be furnished. A form is enclosed to assist you in complying with this requirement.

An exceedingly heavy volume of FOI/PA requests has been received. Despite expansions of our staff, substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

Enclosure

EXHIBIT C

Federal Correctional Institute
P.O. Box 1000
Oxford, WI. 53952

11 June 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

Re: DEA-DR-1-207

In response to your letter of 8 June 1981, I enclose the DEA Privacy Act Verification form as requested. Please note I have added my Social Security Number for your convenience.

As I am not able to comply with your request for a photocopy of an identifying document, as these items are not allowed in the possession of prisoners here at F.C.I. Oxford, I am again having my signature notarized by an officer of the Federal Prison System. I trust that will suffice for your purposes, since if it does not then an innocent man is serving a sentence under the name of Gregory J Wentz, or may be. I doubt if the Federal Courts would allow such a mistake.

If any or all of this request is denied, please cite the specific exemptions which you think justifies your refusal to release information. Also please inform me of your agency's appeal procedure.

It is my understanding that Executive Branch guidelines for implementation of Privacy Act provisions are acknowledgement of receipt of request within 10 working days, herein included an indication as to whether the request will be granted and, if so, when. From that point it is further my understanding that records will be produced within 30 working days. And if this is not possible,

the agency will advise me when it anticipates the request will be granted.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
F.C.I. Oxford

/s/ Dennis Kurzydlo
D. KURZYDLO
Parole Officer
Federal Correctional Institution
Oxford, Wisconsin 53952
"Authorized by the act of July 7 1955
to administer oaths (18 U.S.C. 400.4)."

cc/ Sen. Edward Kennedy
Sen. Joseph Biden
U.S. District Judge, Paul Benson

FOI-09

EXHIBIT D

P.O. Box 1000
Oxford, WI. 53952

Mr. L.W. Nicks
Special Agent In Charge
Drug Enforcement Administration
657 2nd. Avenue North, Room 255
Fargo, ND 58102

28 July, 1981

Mr. Nicks:

In reviewing the Pre-Sentence Investigation Report in the case, United States of America v. Gregory J Wentz, District Court no. C2-80-43 and 44, I have noticed that this writer stands accused of having been "seriously involved in drugs since 1974".

In response to a challenge to the veracity of that statement, Chief Probation Office, Mr. Noah, avers that his statement is an accurate reflection of information received from the DEA and the USDA. Please see Enclosure.

Pursuant to the provisions of the Freedom of Information Act, Title 5 U.S.C. § 552 and the Privacy Act of 1974, Title 5 U.S.C. § 522a(d), I request access to the information which Mr. Noah obtained from the DEA and which was used as the basis for the statement that this writer has been involved in a criminal activity since 1974.

The Office of Management and Budget has established guidelines for implementation of Privacy Act requests. Under these guidelines the agency requested has 10 working days to acknowledge receipt of request and an additional 30 days to answer the request.

Since my request is so narrowly defined and concerns only material readily at hand, I expect no delays with this request.

Your attention to this matter is much appreciated.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

EXHIBIT E

P.O. Box 1000
Oxford, Wisconsin 53952

27 August, 1981

Director, Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

RE: Privacy Act Request

Dear Sir:

During the process of attempting to change some incorrect information in my Pre-Sentence Investigation Report I was informed by the writer of the Report, Chief Probation Officer in North Dakota, Mr. John Noah, that the information which I was challenging was received by him directly from the DEA office in Fargo, North Dakota and from the U.S. Attorney in the same city.

On the 28th of July, 1981, SAIC in Fargo, L.W. Nicks was requested under the provisions of the Privacy Act to grant access to the information upon which he based his statements to the Probation Officer. He was also sent at that time a copy of the Probation Officer's letter to me explaining the source of his information. Both letters are enclosed for your convenience.

As of this date I have had no correspondence from SAIC Nicks on this matter. This is in violation of the guidelines set up by the Office of Budget and Management, which stipulate acknowledgement of receipt of request within ten (10) working days and production of the requested information within thirty (30) working days. As stated in my request, the information requested is so narrowly defined I anticipate no problems of delays in the granting of my request.

I hereby request the Director to consider this letter a formal complaint and to require SAIC to answer the re-

quest for information. Further unexplained delays can only be considered a denial of my request.

Very truly yours,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

cc/ U.S. District Court
District of North Carolina

EXHIBIT F

P.O. Box 1000
Oxford, Wisconsin 53952

18 August 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

RE: DEA-DR-1-207

Dear Sir:

It is now nine weeks since I complied with your request for identification and I have not received the information I requested.

It is my understanding that the Office of Management and Budget has set guidelines for answering FOIA/PA requests. The guidelines stipulate acknowledgement of receipt of request within ten working days and producing the requested material within thirty working days. In the event the agency is unable to meet that thirty day deadline, it is my understanding that the agency is to advise the requester when the request will be granted.

I have not been advised of any date by which the agency anticipates granting my request. I respectfully request such a date.

In the event I do not hear from you in this regard, I will consider the lack of response as a denial of my request.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

cc/ Senator Edward Kennedy
Senator Joseph Biden
U.S. District Judge Paul Benson

EXHIBIT G

SEP 10 1981

Mr. Gregory J. Wentz
P.O. Box 1000
Oxford, Wisconsin 53952

Dear Mr. Wentz:

Re: DEA-81-802-P

This is in response to your letter of August 18, 1981, regarding your pending Freedom of Information/Privacy Act request to the Drug Enforcement Administration (DEA).

DEA has received an exceedingly heavy volume of requests prior to receiving yours and every effort is being made to process your request as quickly as possible.

As stated in our original letter to you, your request was placed on a list of requests awaiting final processing. This list is maintained in chronological order based on date of receipt. Our practice of handling these requests in this manner has been upheld by the courts and we are required by Department of Justice policy to strictly adhere to the "first-in, first-out" concept.

At this time, we are unable to estimate how long it will take to reach your number in sequence. However, please be assured that we carefully monitor all FOI/PA requests and that we continue to apply diligent efforts to completing requests at the earliest possible time and releasing the information to which you are entitled under the FOI/PA.

Sincerely,

RUSS ARUSLAN
Chief
Freedom of Information Division

EXHIBIT H

MEMORANDUM [SEAL]

Subject—FOIA/PA Request—Gregory J. Wentz
81-0764

Date—24 NOV 1981

To Mr. Russ Aruslan
FOIA/PA Unit
Drug Enforcement Administration

From Susan A. Nellor
Attorney-Advisor
Executive Office for
United States Attorneys

We are processing the above-cited request.

XX We located the attached records which originated in your office. Pursuant to 28 C.F.R. 16.43(a)(2), we are referring this material to you for a direct reply to the requester. We have notified the requester of this referral. A copy of the original request is attached for your information.

—— We located certain records which originated in your office. The file numbers (and dates) of those records are attached or listed below, for your use in processing the attached request. Pursuant to 28 C.F.R. 16.43(a)(2), we are referring this material to you for a direct reply to the requester. We have notified the requester of this referral. A copy of the original request is attached for your information.

—— We located the attached records which originated in your office. Pursuant to 28 C.F.R. 16.43(a)(3), we are required to consult with your agency concerning the possible release or withholding of all or part of these records. Accordingly, please review and return the attached material designating that which

may be released and citing the applicable exemptions for any parts which may be exempted from mandatory release.

Additional Comments:

If you have any questions about this referral, please contact *Cynthia Robinson* on *633-4024*.

Attachments, as stated.

EXHIBIT I

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration

DEC 16 1981

Washington, D.C. 20537

Gregory J. Wentz
F.C.I. Oxford
P.O. Box 1000
Oxford, WI 53952

Dear Mr. Wentz:

Re: DEA-81-1525-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

While Processing your request to the Executive Office for United States Attorneys, documents originated by DEA were located and have been referred to us for a direct reply to you. These documents will be processed in chronoligcal order based on the date of receipt.

An exceedingly heavy volume of FOI/PA requests has been received and substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

FOI-07

EXHIBIT J

APR 19 1982

Re: DEA 81-802-P
81-1525-P
Civil Action #82-C-88
U.S. District Court,
Western District of Wisconsin

Mr. Gregory J. Wentz
FCI Oxford
P.O. Box 1000
Oxford, Wisconsin 53952

Dear Mr. Wentz:

Your Freedom of Information/Privacy Act (FOI/PA) request of May 29, 1981, seeking law enforcement investigative records on yourself from the Drug Enforcement Administration (DEA) has been reviewed. In addition, the DEA law enforcement investigative records referred to DEA by the Executive Office for the United States Attorney (EXOUSA) on November 24, 1981, based on your request of June 16, 1981, to that agency, have also been reviewed.

A search of DEA records has been completed, and a determination has been made to deny your request. The DEA Investigative Reporting and Filing System which contains all of the information you seek, including the material forwarded to DEA from EXOUSA, is exempt from the access and accountability provisions of the Privacy Act of 1974, pursuant to 5 USC 552a(j)(2).

In addition, this material is being withheld pursuant to 5 USC 552(b)(3) of the Freedom of Information Act. This exemption provides for the withholding of material which is specifically exempt from disclosure by statute.

If you wish to appeal any denial of your request, you may do so within thirty (30) days pursuant to 26 CFR 16.7.

The appeal should be directed to the Office of Privacy and Information Appeals, Department of Justice, Washington, D.C. 20530. Judicial review will thereafter be available either in the District where you reside or have a principal place of business, in the District where the records are maintained, or in the District of Columbia.

Sincerely,

RUSS ARUSLAN, Chief
Freedom of Information Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 82-C-88

GREGORY J. WENTZ, PLAINTIFF,

vs.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Aug. 4, 1982]

FIRST AMENDED COMPLAINT

The First Amended Complaint of Gregory J. Wentz respectfully represents that he wishes to amend the Original Complaint filed herein to add the following paragraphs:

12.

The Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. § 552(a)(4)(B).

13.

The Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. § 552a(g)(1).

14.

The Defendant, DEA, has maintained in its records, and disseminated inaccurate information concerning Plaintiff.

15.

The inaccurate information maintained and disseminated by DEA has resulted in adverse decisions by the U.S.

Parole Commission directly affecting a liberty interest of Plaintiff.

16.

Plaintiff has been unable to obtain correction of the inaccurate information in DEA records by virtue of DEA's refusal to give serious consideration to Plaintiff's FOIA/PA requests until after Plaintiff filed suit in this matter.

17.

Plaintiff is entitled to a permanent injunction under the provisions of 5 U.S.C. § 552a(g)(2)(A) ordering the Defendant to amend the inaccurate portions of the record.

18.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Plaintiff under the provisions of 5 U.S.C. § 552a(g)(2)(B).

19.

Damages should be assessed against the United States and awarded to the Plaintiff in the amount of $50,000.00 or, such amount the Court finds proper and just, but not less than $1,000.00 pursuant to 5 U.S.C. § 552a(g)(4)(A).

20.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Plaintiff under the provisions of 5 U.S.C. § 552a(g)(4)(B).

21.

The DEA has promulgated regulations at 28 C.F.R. 16.98(a)(3) and given reasons therefore at 16.98(b)(3), which do not comply with the provisions under which they are promulgated, 5 U.S.C. § 552a(k) or with the Administrative Procedures Act.

22.

Plaintiff is entitled to a Declaratory Judgement prohibiting DEA from exempting material in this case pursuant to 5 U.S.C. § 552a(k)(2), and requiring Defendant DEA to promulgate regulations in conformance with the Privacy Act and the Administrative Procedures Act.

WHEREFORE, Plaintiff prays:

I. for leave of Court to amend the Original Complaint as set forth hereinabove;

II. for all relief request in the Original Complaint;

III. that a permanent injunction issue herein enjoining the DEA from maintaining inaccurate records, requiring the DEA to amend all inaccurate portions of the records, and to inform the U.S. Parole Commission of both the inaccuracies presently contained in the record and the amendments that subsequently occur.

IV. for damages in the amount of $50,000.00 or, in such amount the Court finds proper and just, but not less than $1,000.00.

V. that there be a judgment herein assessing all costs of this civil action against the United States and awarding the Plaintiff reasonable attorney's fees for the prosecution of this action;

VI. that a Declaratory Judgment issue herein prohibiting Defendant from exempting material in this case pursuant to 5 U.S.C. § 552a(k)(2), and requiring DEA to promulgate new regulations under 28 C.F.R. 16.98 (a)(3) and (b)(3) in conformance with the Privacy Act provisions and the Administrative Procedures Act.

VII. that the Court reconsider its denial of Plaintiff's request for appointed counsel.

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
P.O. Box 1000
Oxford, Wisconsin 53952

ORDER

Let the foregoing First Amended Complaint be filed as prayed for and according to law.

Madison, Wisconsin, July ——, 1982.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-88

GREGORY J. WENTZ, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Aug. 4, 1982]

ORDER

The Court is in receipt of plaintiff's cross motion for summary judgment; plaintiff's motion for detailed justification, itemization and indexing under *Vaughn v. Rosen*, 484 F.2d 820, *cert. denied*, 415 U.S. 977 (1974); plaintiff's amended complaint; and a letter from defendant asserting that plaintiff's response to defendant's summary judgment motion is untimely with a request that judgment for defendant be entered or, in the alternative, that an extension be granted for reply to plaintiff's response.

Plaintiff was granted an extension to respond to defendant's motion for summary judgment motion to July 19, 1982, by order dated July 2, 1982. Plaintiff subsequently informed the court that he would have difficulty meeting that deadline. His response was received on July 27, 1982. The Court is convinced that this *pro se* plaintiff has been diligent in complying with the court's order considering the relative legal complexity of the issue being briefed. The Court will not, therefore, entertain a motion to dismiss for failure to prosecute even if the defendant makes a proper motion.

Plaintiff's amended complaint will be accepted. Defendant has made no objection to it and it appears that defendant reasonably anticipated plaintiff's action in this regard.

Plaintiff's motion under *Vaughn v. Rosen* will be denied at this time pending receipt of defendant's reply brief. If the court is convinced at that time that a ruling on this motion is necessary for decision on the summary judgment motions, the court will reconsider the denial and give defendant an opportunity to respond to the motion.

Defendant's request for thirty (30) days to reply to plaintiff's response and cross motion would seem to be justified in that plaintiff has expanded his complaint to include a claim that the information in his DEA file is inaccurate. However, the court must take notice of the burden on plaintiff as it concerns the inaccuracy of the information and the proof required to show wilful and intentional dissemination of such information. These burdens have clearly not been met at this stage because the government has not as yet answered concerning the claim much less admitted wilful and intentional wrongdoing. Thus summary judgment cannot be granted on the claim under 5 U.S.C. § 552a(g)(1)(C) because of the existence of factual disputes.

Accordingly, defendant need not reply to that portion of plaintiff's brief directed at inaccuracy of the records. The reply should be directed only at that portion of the brief which responds to plaintiff's right to access. The time given in the order below should be adequate.

Plaintiff has renewed his request for appointment of counsel. The request is denied for the reasons stated in the court's previous order. In accordance with *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), the Court finds that the factual and legal issues involved are not so complex as to require the appointment of counsel. This is particularly true in this case. Plaintiff has shown a more than adequate ability to pursue his claim *pro se*.

ORDER

IT IS ORDERED that plaintiff's request for leave to file an amended complaint is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for appointment of counsel is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for detailed justification, itemization and indexing under *Vaughn v. Rosen* is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment only as it concerns his claim under 5 U.S.C. § 552a(g)(1)(C) is DENIED.

IT IS FURTHER ORDERED that defendant's reply brief is due on August 20, 1982.

Entered this 3rd day of August, 1982.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

[Copy of this document has been mailed to the following: pltf & AUSA Einerson this 4th day of Aug. 1982]

By s/ S. Hahn
Deputy Clerk

U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82-C-243

ALFRED B. SHAPIRO, PLAINTIFF

v.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Aug. 6, 1982]

AFFIDAVIT OF RUSS ARSLAN

I, Russ Arslan, being duly sworn, depose and say as follows:

1. I am the Chief of the Freedom of Information Section of the Drug Enforcement Administration (DEA). As such, I am officially responsible for initially granting or denying requests made pursuant to the Freedom of Information/Privacy Acts (FOIA/PA), as amended (5 USC 552 and USC 552a), respectively.

2. I am familiar with the Complaint filed by the Plaintiff in which the Plaintiff made a request, pursuant to the Freedom of Information Act and Privacy Act, that DEA disclose certain documents.

3. By letter dated October 16, 1981, the Plaintiff requested ". . . a copy of any and all records or documents which pertain to any investigation of me or my activities. . . ." A true and correct copy of the Plaintiff's October 16, 1981 letter is attached hereto as Exhibit A.

4. By letter dated October 28, 1981, DEA advised the Plaintiff that he would have to submit his notarized signature or other proof of identity before DEA could begin processing his request. A true and correct copy of

DEA's October 28, 1981 letter is attached hereto as Exhibit B.

5. On November 11, 1981, the Plaintiff forwarded an executed Identity Verification and a copy of his fingerprint card to DEA. True and correct copies of the Identity Verification and fingerprint card are attached hereto as Exhibits C and C1, respectively.

6. By letter dated December 4, 1981, DEA advised the Plaintiff that his request will be assigned number 81-1499-P and will be handled in chronological order based on the date of receipt. A true and correct copy of DEA's December 4, 1981 letter is attached hereto as Exhibit D.

7. By letter dated January 13, 1982, the Plaintiff advised DEA that he has received no information from DEA for 3½ months. A true and correct copy of the Plaintiff's letter of January 13, 1982 is attached hereto as Exhibit E.

8. By letter dated June 4, 1982, the Plaintiff was notified that the processing of his request had been completed and the Defendant further advised the Plaintiff that there was no documents available to him because of the restrictive provisions of the Privacy Act of 1974. A true and correct copy of the Defendant's June 4, 1982 letter is attached hereto as Exhibit F.

9. I have reviewed the Plaintiff's October 16, 1981 request and the additional attachments postmarked November 12, 1981 and have decided that the Privacy Act prohibitions relied upon in DEA's determination letter of June 4, 1982, are applicable. All DEA references to the Plaintiff, which may be responsive to the request, cannot be released.

10. I hereby verify that each reference to the Plaintiff is subject to exemption (j) (2) of the Privacy Act (5 USC 552a) and further, that said references are located in criminal investigatory files which are contained in a

system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et seq.

11. Accordingly all references to the Plaintiff have been properly withheld pursuant to the Privacy Act 5 USC 552a exemption (j)(2) and to the FOI Act of 5 USC 552 exemption (b)(3).

12. It is unnecessary to provide the Plaintiff with a detailed justification of each and every additional FOIA exemption that may be applicable on the basis that the (j)(2) exemption and the (b)(3) exemption are first and foremost categorically restrictive statutes prohibiting disclosure, and therefore references to the Plaintiff are not subject to discretionary release.

13. The subject of this Affidavit and the statements set forth herein are within my official purview and are true and correct to the best of my information, knowledge and belief.

/s/ Russ Arslan
RUSS ARSLAN,
Chief
Freedom of Information Section
Drug Enforcement Administration
Department of Justice

Sworn and subscribed to before me this 8th day of June, 1982.

/s/ Katherine L. Webster
Notary Public

My Commission Expires January 14, 1987

[SEAL]

EXHIBIT A

October 16, 1981
Drug Enforcement Administration
1405 Eye Street, N.W.
Washington, D.C. 20537

Re: Privacy Act Request

Dear Sirs:

Under the provisions of the Privacy Act of 1974, 5 U.S.C. 522a, I hereby request a copy of any and all records or documents which pertain to any investigation of me or my activities. This should be construed as the broadest possible request for information concerning me which is in the possession of your agency.

If there are any fees for copying the records I am requesting, please inform me before you fill the request.

If all or part of this request is denied, please cite the specific exemption(s) which you feel justifies your refusal to release the information. Also, please inform me of your agency's appeal procedure.

Your assistance is appreciated.

/s/ Alfred Bruce Shapiro
ALFRED BRUCE SHAPIRO
Social Security No. 438-60-2137
Reg. No. 05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

EXHIBIT B

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
OCT 28 1981
Washington, D.C. 20537

Alfred Bruce Shapiro
Reg. No. 051580-035
P.O. Box 1000
Oxford, Wisconsin 53952

Re: DEA-DR-1-383-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

Before DEA can begin processing your request, it will be necessary for you to submit your *notarized signature* or other proof of identity. This procedure is designed to ensure that information pertaining to an individual is released only to that person. Also, to ensure an accurate search of DEA records, an individual's name, date, and place of birth must be furnished. A form is enclosed to assist you in complying with this requirement.

An exceedingly heavy volume of FOI/PA requests has been received and substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

Enclosure

FOI-06

EXHIBIT C

DR-1-383-P

DEA PRIVACY ACT
IDENTITY VERIFICATION

81-1499-P

In accordance with 28 CFR 16.41, the information on this form is required for all individuals submitting requests by mail under the Privacy Act, P.L. 93-579. This information will be used to verify the applicant's identity and to identify records available to him/her. Return this form to the Drug Enforcement Administration, Freedom of Information Division, 1405 Eye Street, N.W., Washington, DC 20537.

FULL NAME OF REQUESTER: Alfred Bruce Shapiro

CURRENT ADDRESS: Reg. No. 05158-035
P.O. Box 1000 Oxford Wisconsin 53952

DATE OF BIRTH: December 29, 1942

PLACE OF BIRTH: Alexandria, Louisiana

EMPLOYEE IDENTIFICATION NO. (If applicable):
Social Security Account No. 438-60-2137

SIGNATURE: /s/ Alfred B. Shapiro

Please attach a photocopy of an identifying document (such as a passport, identification badge, drivers' license, etc.) *or* complete the form below.

I certify that I am the person named above, and I understand that any falsification of this statement is punish-

able under the provisions of 18 USC 1001 by a fine or imprisonment or both.

Signature: /s/ Alfred Bruce Shapiro

/s/ [Illegible]

Subscribed and sworn to before me this 9th day of Nov., 1981.

_____

Notary Public

My Commission Expires: _____

FOI-09

EXHIBIT D

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
Washington, D.C. 20537

DEC 4 1981

Mr. Alfred Bruce Shapiro
Reg. No. 05158-035
Post Office Box 1000
Oxford, Wisconsin 53952

Dear Mr. Shapiro:

Re: DEA-81-1499-P

This will acknowledge receipt of the information we need to process your Freedom of Information/Privacy Act (FOI/PA) request. Please make note of the new control number reference above pertaining to your FOI/PA request.

As we stated in our original letter to you, your request will be placed on a list of requests awaiting final processing. This list is maintained in chronological order based on date of receipt. Our practice of handling these requests in this manner has been upheld by the courts and we are required by Department of Justice policy to strictly adhere to the "first-in, first-out" concept.

At this time, we are unable to estimate how long it will take to reach your number in sequence. However, please be assured that we carefully monitor all FOI/PA requests and that we continue to apply diligent efforts to completing requests at the earliest possible time and releasing the information to which you are entitled under the FOI/PA.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ DNZ
Freedom of Information Division

EXHIBIT E

January 13, 1982

Mr. Russ Aruslan, Chief
Freedom of Information Division
Drug Enforcement Administration
Washington, D.C. 20537
Re: DEA-81-1499-P

Dear Mr. Aruslan:

On December 4, 1981, I received a letter from your agency informing me that you had received the information necessary to process my request for information concerning investigations of myself. Since that date, I have received no information concerning the possible cost of reproduction of such material. In fact, I have received no information whatsoever. It seems to me that some preliminary estimate of costs could be undertaken and other such steps could be disposed of so that my request could be filled as soon as possible. A delay of 3½ months from the date of my original contact with you borders on the unacceptable.

I would appreciate your office taking whatever steps are necessary to expedite this matter.

Thanking you, I remain

Sincerely yours,

/s/ Alfred B. Shapiro
ALFRED B. SHAPIRO
05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

EXHIBIT F

JUN 4 1982

Alfred Bruce Shapiro
Reg. No. 051580-035
P.O. Box 1000
Oxford, Wisconsin 53952

81-1499-P

Dear Mr. Shapiro:

Your perfected Privacy Act request postmarked November 12, 1981 seeking law enforcement investigatory records on yourself from the Drug Enforcement Administration (DEA) has been reviewed. A search of DEA records has been completed and a determination has been made to deny your request. The DEA Investigative Reporting and Filing System which contains all of the information you seek is exempt from the access and accountability provisions of the Privacy Act of 1974 pursuant to 5 U.S.C. 552a(j)(2).

In addition, this material is being withheld pursuant to 5 USC 552(b)(3) of the Freedom of Information Act. This exemption provides for the withholding of material which is specifically exempt from disclosure by statute.

If you wish to appeal any denial of your request, you may do so within thirty (30) days pursuant to 28 CFR 16.7. The appeal should be directed to the Office of Privacy and Information Appeals, Department of Justice, Washington, D.C. 20530. Judicial review will thereafter be available either in the District where you reside or have a principal place of business, in the District where the records are maintained, or in the District of Columbia.

Sincerely,

FRANCIS M. MULLEN, JR.
Acting Administrator

by Russ Arslan, Chief
Freedom of Information Section

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-88

GREGORY J. WENTZ, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

82-C-243

ALFRED B. SHAPIRO, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Oct. 8, 1982]

MEMORANDUM AND ORDER

Before the Court are cross motions for summary judgment in the above named cases. Because the two cases raise identical issues and have been briefed in an almost identical fashion, these cases are consolidated for purposes of this order pursuant to Rule 42(a), Federal Rules of Civil Procedure.

The plaintiffs in these actions seek access to the records of the Drug Enforcement Agency which pertains to them. Disclosure of these records is sought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1).

Each of the plaintiffs requested, pursuant to the Privacy Act, access to information within the control of the Drug Enforcement Agency ("DEA"). Wentz' request was made in May, 1981; Shapiro's in November, 1981. After these requests were perfected by the plaintiffs through the submission of identifying information, DEA denied access, basing the withholding of the information in the records on exemptions provided in the Privacy Act and in the Freedom of Information Act ("FOIA"). The specific exemptions relied upon were 5 U.S.C. § 552(b)(3) and 5 U.S.C. 552a(j)(2).

Wentz received the determination to deny his request in April, 1982; Shapiro in June, 1982. While each of the plaintiffs seek access to their respective files, Wentz, in addition, seeks correction of assertedly incorrect information in the records which contain his name and also seeks damages under 5 U.S.C. § 552a(g)(4). The information Wentz claims is incorrect concerns the component make-up and value of the controlled substance, possession of which led to his criminal conviction, and the statement in his pre-sentence report, apparently based on DEA records, that he had been involved with drugs for a number of years prior to his conviction.

Since the exemptions which the defendant claims apply to both disclosure and correction of incorrect information, 5 U.S.C. § 552a(j), the Court will treat the claims of each plaintiff identically. The plaintiffs have relied on each other's briefs and the defendant has filed virtually identical briefs on the issues raised by the summary judgment motions.

MEMORANDUM

Defendants rely on the exemption provisions of the FOIA and the Privacy Act for the proposition that any information contained in systems of records compiled for investigatory law enforcement purposes is exempt from

disclosure. The applicable parts of the exemption statutes are as follows:

5 U.S.C. § 552(b)

> (b) This section does not apply to matters that are—
>
> > (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. § 552a(j)

> (j) General exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> > (2) maintained by an agency or component thereof which perform as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals; and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual

> criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

As it concerns the exemptions in FOIA at § 552(b)(3), it is clear that the Privacy Act is a "statute" which explicitly exempts certain information from disclosure. *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980). The Privacy Act, designed as it was to protect individuals from government disclosure of information about them, must be read in such a way despite plaintiffs' assertions to the contrary. Thus, plaintiffs' right to access to the records involved here must rise or fall on the Privacy Act alone.

The Privacy Act exemption relied upon by defendant requires that rules be promulgated, naming the systems of records exempted under the provisions under § 552a (j). The DEA has done so at 28 C.F.R. § 16.98. The affidavit of Russ Arslan, filed on behalf of the defendant in support of its summary judgment motions, states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 U.S.C. 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted

as published in the Department of Justice Regulations cited at 28 C.F.R. 16.98 et. seq.[1]

The defendant reads § 552a(j) to create a blanket exemption from disclosure for systems of records maintained by DEA, an agency which is obviously one which "performs as its principal function any activity pertaining to the enforcement of criminal laws . . ." It also seems clear that defendant is relying on subsections (j)(2)(B) and (C) to support the scope of the exemption claimed in these cases. According to the Arslan affidavit, all of the references to the plaintiffs appear in records subject to the (j)(2) exemption. It is therefore apparent that the systems of records which contain references to plaintiffs must be included in that list of systems at 28 C.F.R. § 16.98(c). These are the only ones which are based on the (j)(2) exemption. Plaintiffs' assertions that DEA cannot depend on the (j)(2) exemption for systems listed in 28 C.F.R. § 16.98(a) are correct but irrelevant because a necessary implication from the affidavit language quoted above is that the systems listed in (a)(3) are not involved.

The Court must conclude that the blanket exemption claimed by the DEA is correct. The systems involved are listed in the regulations and the reasons for the exemptions are listed with sufficient specificity to accomplish the purpose of the statute which required promulgation of the regulations. The arguments raised by plaintiffs have considerable force but must be rejected because of the rather sweeping language of the statute in question, § 552a(j)(2). The DEA has done what the statute requires and is entitled to the exemption for the systems of records listed at 28 C.F.R. § 16.98(c).

See also: *Nunez v. Drug Enforcement Administration*, 497 F. Supp. 209 (S.D.N.Y. 1980) (records sought relat-

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[1] This statement was contained in Arslan's affidavit filed in plaintiff Wentz's action. It is virtually identical to that filed in Shapiro's action.

ing to DEA law enforcement activities not accessible pursuant to 5 U.S.C. § 552a(j)(2); *Greentree v. U.S. Customs Service*, 515 F. Supp. 1145 (D.C.D.C. 1981) (the Privacy Act exemption statute is a "statute" within the meaning of 5 U.S.C. § 552(b)(3).

Plaintiff Wentz' claims concerning the incorrect information in the records is, as the Court has mentioned, subject to the same exemptions that have been properly raised by defendant as it concerns disclosure. Thus, the amendment to the complaint must fall on the summary judgment motion along with the claims in the original complaint. *See Varona Pacheco v. Federal Bureau of Investigation*, 456 F. Supp. 1024, 1034, (D.C. Puerto Rico 1978) (exemption provisions of the Privacy Act apply to correction provisions of the Act as well as to the disclosure provisions). This does not mean that plaintiff does not have a right to have accurate information before those who will make decisions concerning his sentence and parole. It only means that the forum for challenging the information is not an action under the Privacy Act.

Accordingly,

ORDER

IT IS ORDERED that plaintiffs' motions for summary judgment are DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment, as they concern the complaints and amendments, are GRANTED.

Entered this 6th day of October, 1982.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

[Copy of this document has been mailed to the following: pltf & AUSA Einerson this 8th day of Octfl 1982]

By /s/ S. Hahn
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 82-2818 and 82-2819

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
PLAINTIFFS-APPELLANTS,

v.

DRUG ENFORCEMENT ADMINISTRATION,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Wisconsin

Nos. 82 C 88 and 82 C 243—John C. Shabaz, *Judge*

ARGUED SEPTEMBER 16, 1983—DECIDED NOVEMBER 16, 1983

Before BAUER, WOOD, *Circuit Judges*, and NEAHER,* *Senior District Judge.*

BAUER, *Circuit Judge.* Plaintiffs-appellants Shapiro and Wentz each were convicted in unrelated cases of violating 21 U.S.C. § 841 (1980), and both currently are serving prison terms. Shapiro and Wentz filed separate requests with the Drug Enforcement Administration (DEA) seeking access to their DEA files pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976)

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

(FOIA) and the Privacy Act, 5 U.S.C. § 552a (1975) (Privacy Act). The district court denied their requests on the ground that the records are exempt under Privacy Act Section (j)(2) (Exemption (j)(2)) and FOIA Section (b)(3) (Exemption 3). We affirm.

I. Background

In May 1981, Wentz filed a request with the DEA to obtain a copy of the DEA records pertaining to him; Shapiro made his request in October 1981. In April 1982, the DEA notified Wentz that all the documents he requested were in the DEA Investigative Reporting and Filing System and thus were exempt from access pursuant to Exemption (j)(2) of the Privacy Act and Exemption 3 of the FOIA. In June 1982, the DEA notified Shapiro that his request had been denied for the same reasons.

In March 1982, Wentz filed suit to compel release of the documents he had requested. Wentz later added a claim that the agency be required to correct allegedly inaccurate information in his files pursuant to the Privacy Act. Shapiro filed his suit in May 1982.

The district court consolidated the two cases because they raised identical issues. In October 1982, the district court granted the DEA's motions for summary judgment. The court held that the DEA had met the Privacy Act Exemption (j)(2) requirements by exempting these records from disclosure at 28 C.F.R. § 16.98(c). The district court also held that because the Privacy Act is a statute that exempts this information from disclosure, the information is exempt under FOIA Exemption 3 as well. Finally, the court held that since Privacy Act Exemption (j)(2) applies to the Act's correction provisions, Wentz's request for correction of the allegedly inaccurate records also must be denied.

II. Privacy Act Exemption (j)(2)

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, *see* 5 U.S.C. § 552a(d), and prevents the release of such records to third parties without the consent of the individual except under specific instances, *see* 5 U.S.C. § 552a(b). The Privacy Act applies only to agency "records," which the Act defines as agency files or documents about individuals, contained in a "system of records," which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. *See* 5 U.S.C. §§ 552(a)(4) and (5).

An individual's right of access under the Privacy Act is not unlimited, however. Sections (j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under (j)(2), the head of an agency whose principal function is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

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[1] 5 U.S.C. § 552a(j)(2) provides:

> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> • • • •
>
> 2 maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and dispo-

The DEA has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Investigative Reporting and Filing System from access to individuals.[2] The regulation justifies the exemption on the ground that access to such records would alert a subject to the existence of an investigation and thereby impede law enforcement efforts.[3] As the district court held, this explanation is sufficiently specific to satisfy the (j)(2) requirement that the regulation include reasons why the system is to be exempted.

Appellants' argument that this explanation renders the exemption inapplicable to them because they currently are imprisoned is without merit. First, the fact that appellants already have been convicted does not mean that the DEA is no longer investigating them. Moreover, Exemption (j)(2) does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly, as the DEA has done here.

The DEA supported its motion for summary judgment in each case with an affidavit by Russ Arslan, the chief of the DEA's Freedom of Information Division. The affidavits stated that all references to Wentz and Shapiro are

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sition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

The Act labels this a "general" exemption, as opposed to the "specific" exemptions at 5 U.S.C. § 552a(k).

[2] The regulation appears at 28 C.F.R. 16.98(c).

[3] 28 C.F.R. 16.98(d)(3).

contained in criminal investigatory files that have been exempted according to published regulations.[4]

Wentz and Shapiro argue that the Arslan affidavits are insufficient. They contend that this court should require the DEA to prepare a *Vaughn* index of the requested documents, which would oblige the agency to "specify in detail which portions of the document are disclosable and which exempt." *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1977).

While courts mandate *Vaughn* indexing where an agency relies solely on an FOIA exemption to withhold information, the procedure does not apply to Exemption (j) of the Privacy Act. The FOIA exemptions are "specific" exemptions that apply only to individual documents; thus, courts require an indexed listing of the requested documents because "[w]hen the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id.* at 825. In contrast, Privacy Act Exemption (j) applies to whole systems of records. The only requirements are that the agency's principal function be law enforcement, that the system of records be compiled for the purpose of criminal investigation, and that the agency promulgate regulations exempting the system of records. As already noted, the DEA has met these requirements here. The Privacy Act requires nothing more

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[4] Arslan's affidavit in Wentz's case states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 USC 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et. seq.

R. 14, at 3.

Arslan's affidavit in Shapiro's case is basically the same. See R. 7, at 2.

from an agency seeking the (j)(2) exemption.[5] The district court thus properly held that the requested documents are exempt under the Privacy Act.

III. Freedom Of Information Act

Appellants Wentz and Shapiro next argue that they may obtain the requested records under the FOIA. Because their position conflicts with both the statutory language and legislative history of the FOIA and the Privacy Act, we affirm the district court's denial of access under the FOIA as well.

A. Background

Congress enacted the FOIA in 1966. The Act is a general disclosure statute whose purpose is to promote public access to federal government records. Just as the Privacy Act does not allow unlimited access to agency records, the FOIA contains exemptions that allow an agency to withhold records under certain circumstances; these nine "specific" exemptions are listed at 5 U.S.C. § 552(b).

Exemption 3, 5 U.S.C. § 552(b)(3), provides that the FOIA does not apply to information "specifically exempted" by other statutes.[6] The DEA has relied on Ex-

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[5] This conclusion is underscored by the Privacy Act's requirement of *de novo* review and possible *in camera* inspection if an agency invokes a Section (k) "specific" exemption. See 5 U.S.C. 552a(g)(3)(A). There is no such provision for agencies that seek the "general" exemptions in Section (j).

[6] 5 U.S.C. § 552(b)(3) provides:

> This section does not apply to matters that are—
>
> * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

emption 3 to deny appellants' request. It reasons that because the requested information is exempted from disclosure by the Privacy Act, the information also is unavailable under the FOIA. Wentz and Shapiro contend that the Privacy Act is not an Exemption 3 "statute," and thus the DEA may not use Exemption 3 to deny their request.

The district court held that the Privacy Act is a FOIA Exemption 3 statute. This holding is supported by our decision in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). In *Terkel*, we held that the FBI was not required to disclose documents under the FOIA that were exempt from release under Privacy Act Exemption (k): "Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Id.* at 216.

The Fifth Circuit also has held that requesters may not use the FOIA to avoid the Privacy Act nondisclosure provisions. In *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), the court specifically held that the Privacy Act is a FOIA Exemption 3 statute. Several recent district court decisions also have held that an agency may not be compelled to disclose information under the FOIA if that information is exempt from disclosure under the Privacy Act. *See Martin v. FBI*, No. 83 C 123 (N.D. Ill. Sept. 30, 1983); *Rachel v. Department of Justice*, No. 83 C 0434 (N.D. Ill. Aug. 1, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Anderson v. Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl v. Immigration and Naturalization Service*, No. C-80-1210 (N.D. Cal. Dec. 17, 1981).

On the other hand, two circuit courts recently have held that the Privacy Act is not a FOIA Exemption 3 statute. *See Porter v. Department of Justice*, No. 82-1833 (3rd

Cir. Sept. 15, 1983); *Provenzano v. Department of Justice*, No. 82-5681 (3rd Cir. Sept. 15, 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

Appellants urge us to reconsider our holding in *Terkel v. Kelley, supra*. Upon close examination of both the statutory language and relevant legislative history, we are persuaded to reaffirm our earlier decision. We hold that the district court correctly decided that the Privacy Act's nondisclosure provisions apply to FOIA requests under FOIA Exemption 3.

B. The Literal Requirements of FOIA Exemption 3

In order to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must "leave no discretion on the issue" of disclosure, or must establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." *See* 5 U.S.C. § 555(b)(3). Privacy Act Exemption (j)(2) clearly meets these requirements. First, its provisions specifically exempt the information requested here. Second, it describes the type of record to be withheld with sufficient specificity to meet the requirement that it refer to "particular types of matters to be withheld." Appellants' argument that Exemption (j)(2) vests too much discretion with the agencies is thus without merit.

Appellants contend that Congress still could not have intended the Privacy Act to be an Exemption 3 statute because nowhere in the legislative history of the Privacy Act or the 1976 proceedings that amended Exemption 3 did Congress refer to the Privacy Act as an Exemption 3 statute. This argument is also without merit, however, because appellants have not shown any congressional statement that the Privacy Act is *not* an Exemption 3 statute. Rather, Congress set out specific criteria in Exemption 3, and the Privacy Act meets these requirements.

Appellants also argue that because Privacy Act exemption (j) exempts "any system of records within the agency

from any part of *this* section" (emphasis added), it is limited to the Privacy Act itself, Section 552a. Yet this interpretation would allow a requester to bypass the Exemption (j) nondisclosure provision and seek the information through the FOIA instead. For reasons that we outline below in our discussion of Privacy Act Section (b) (2), this result is contrary to clearly stated congressional intent.

C. The Interrelationship of the Privacy Act and the Freedom of Information Act: Privacy Act Section (b) (2)

1. *Statutory Language*

In addition to the argument that the term "this section" at Exemption (j) renders the exemption inapplicable to the FOIA disclosure requirements, appellants contend that the Privacy Act Section (b) (2) specifically preserves the FOIA disclosure obligations. Section (b) (2) provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> • • • • •
>
> (2) required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b) (2).

Appellants argue that Section (b) is the provision designed to govern disclosure under the Privacy Act, and because Section (b) is not covered under Privacy Act Exemption (j),[7] Congress has exempted the FOIA disclosure

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[7] *See supra* note 1.

requirements from Exemption (j).[8] For several reasons, however, we cannot accept this interpretation of the interrelationship of these two statutes. First, we disagree with appellants' reading of Section (b). The provisions of Section (b)(1)-(11) all require agency disclosure to a third party requester even though the individual to whom the record pertains has not consented to the disclosure. Yet the introductory language of Section (b) shows that the provisions of (b)(1)-(11) do not apply when the individual consents to disclosure. The language of this opening proviso shows that (b)(2) governs only third party requests for information; where the individual has made a first party request for information pertaining to himself, the FOIA exemption carved out at Section (b)(2) simply does not apply.[9] Section (d) provides sole access for first party requests under the Act.[10]

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[8] The court in *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), relied on this construction in reaching its conclusion.

[9] This conclusion is supported by the legislative history, which shows that Section (b)(2) was designed to protect third party access to agency records. *See* Subsection C, part 2 of text *infra*.

[10] 5 U.S.C. § 552a(d) provides in pertinent part:

> Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
>
> (2) permit the individual to request amendment of a record pertaining to him and—
>
> (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date or receipt of such request, acknowledge in writing such receipt; and

2. *Legislative History*

Second, appellants' position would result in an emasculation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent. According to appellants' interpretation, any requester could use the FOIA to force an agency to disclose information even when that information is specifically exempt from disclosure under Exemption (j). The scope of Exemption (j) thus would be limited to the scope of any applicable FOIA exemptions. This limitation on Exemption (j) is contrary to the intent of Congress, however, as shown both by the exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act.

The legislative history reveals Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations. In its report on the Senate version of the Privacy Act, the Senate Government Operations Committee observed that law enforcement agencies often maintain files with "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity"; the report concluded that

---

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

• • • •

"it would not be appropriate to allow individuals to see their own intelligence or investigative files." S. Rep. No. 93-1183, 93d Cong., 2d Sess., at 23 (1974).

The House of Representatives Government Operations Committee report commented on the House version's exemption from disclosure for Central Intelligence Agency and criminal justice records and also concluded: "The Committee believes that such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. No. 93-1416, 93d Cong., 2d Sess., at 18 (1974). This congressional concern that first party requesters not be allowed to require agencies to disclose criminal justice records relating to them is supported by Representative Moorehead's explanation of the Privacy Act when the legislation was presented on the House floor: "[e]ach individual shall be given access to his record within the system on his request, with the exception of files related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, Source Book on Privacy 883 (1976) (hereinafter Source Book).

Appellants place great emphasis on the original Senate version of the Privacy bill, which contained a provision making the Act's nondisclosure provisions subject to other federal laws and regulations, *see* Section 205(b), S. 3418, Source Book at 143. This provision, they maintain, was included in the final compromise bill as Section (b)(2), and thus shows that Congress intended FOIA access to be unaffected by the Privacy Act nondisclosure provisions.

We cannot accept this interpretation of congressional intent. As noted above, in its final version Section (b)(2) is prefaced by an introductory proviso making it inapplicable where an individual requests access to his own records. Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate

version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q)[11] without any limiting provisos.[12]

Section (b)(2) apparently was included to guarantee that the access that the press and media enjoyed under the FOIA would not be curtailed by the Privacy Act. The Senate Report explained that an earlier version of Subsection (b)(2) was included in the Privacy bill "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* Source Book at 224.

In response to our conclusion that their interpretation would render Privacy Act Exemption (j) virtually meaningless, appellants contend that under their position Exemption (j) would retain some meaning because it would exempt agencies from other requirements of the Act not related to disclosure. For example, an agency could rely on Exemption (j) to avoid many of the Section (e) requirements intended to insure that records are collected and maintained accurately. *See* 5 U.S.C. § 552a(e). *See also Greentree, supra*, 674 F.2d at 81.

Although Exemption (j) indeed specifically exempts agencies from complying with certain Privacy Act requirements besides disclosure, it also clearly exempts

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[11] No agency shall rely on any exemption contained in section 552 [FOIA] of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

5 U.S.C. § 552(a)(q).

[12] The Fifth Circuit relied on this reasoning to hold that the Privacy Act is an Exemption 3 statute. *See Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

agencies from the disclosure provision, Section (d). Appellants' interpretation here is valid only if Section (b), to which Exemption (j) does not apply, covers both first party and third party requests. Since we are persuaded that Section (d) alone governs first party access, we must abide by the literal terms of Exemption (j) and hold that it exempts agencies from being required to disclose certain investigatory records to first party requesters.

Our conclusion is fortified by the legislative history of the Act. As we have noted, Congress expressed its concern that individuals not use the Act to gain access to sensitive criminal justice records. On the other hand, appellants have shown no examples of congressional concern that agencies be allowed to use the Privacy Act exemptions to avoid other Act requirements. We cannot ignore the clearly stated legislative intent and relegate the effect of the Act's exemptions to other provisions that apparently were less important to Congress.

Appellants also argue that various contemporary governmental interpretations of the Privacy Act contradict the government's current position. *See* OMB Report at 40 Fed. Reg. 56742-43 (1975); Justice Department Regulation at 28 C.F.R. 16.57. In response, the government notes that the Justice Department issued a letter several months after the Privacy Act was passed asserting that the Act was the exclusive avenue for first party requests, *see* Source Book at 1177-78, and that the OMB has proposed new guidelines stating that the Privacy Act is an Exemption 3 statute, *see* 48 Fed. Reg. 36359 (1983). These differing interpretations do not help us in our current task. Rather, they show only that government agencies have been confused about the interrelationship between the Privacy Act and the FOIA.

In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would

enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

3. *Effect of Government's Construction: Full Meaning for Both Acts*

Whereas appellants' interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning. On the one hand, agencies could refuse first party requests for the type of information described in Exemption (j), as the DEA did here. At the same time, the FOIA still would retain its vitality. For example, although FOIA Exemption 7 allows greater access to law enforcement data than does Privacy Act Exemption (j) in some instances, the FOIA exemption applies in many cases where the Privacy Act's exemption does not.[13] Exemption 7 governs any third party request, any request for documents that are not "records" within a "system of records," and any first party request for "records" that an

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[13] FOIA Exemption 7 states that:

> (b) This section does not apply to matters that are—
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

agency has not exempted from access according to the Privacy Act's requirements.

Both appellants and the court in *Greentree*, *supra*, 674 F.2d at 79-80, note that the government's construction could result in a "third party anomaly." Because third party requests under the FOIA are protected from the Privacy Act's nondisclosure provisions by Privacy Act Section (b)(2), it is possible that a third party could have access to information about an individual that the individual himself could not obtain.

Merely showing that such an anomaly might exist, however, is not sufficient. The crucial question is whether Congress was aware of this possibility and drafted the Privacy Act to prevent it from occurring. The legislative history does not show that Congress was aware that this "third party anomaly" would arise. The floor managers of the Act explained the amendment that added Section (b)(2) to the Act as follows:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the *status quo as interpreted by the courts* regarding the disclosure of personal information under that section (the FOIA).

Source Book at 861 (Senator Ervin's explanation to Senate), 989 (Representative Moorehead's explanation to House) (emphasis added).

Under the "status quo as interpreted by the courts" at that time, third party requesters enjoyed few rights of access to records concerning other persons. The courts interpreted FOIA Exemption 6, which exempts certain files from access where disclosure would invade personal privacy, very broadly. *See, e.g.*, *White Hobby USA, Inc., v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Al-*

liance v. U.S. Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the "status quo as interpreted by the courts" at that time.

Appellants also have not shown that even today the third party anomaly would arise more than rarely. As we have noted, many first party and third party requests will concern records that are not covered under the Privacy Act at all. Even where a record would be exempt from a first party request because of a Privacy Act exemption, FOIA Exemptions 6 and 7 likely would block the third party request as well.

D. Conclusion

A thorough examination of both the language of the FOIA and the Privacy Act and the relevant legislative history persuades us that the Privacy Act is a "statute" under FOIA Exemption 3. The district court properly held that because the records that Wentz and Shapiro seek are exempt from disclosure under the Privacy Act Exemption (j)(2), they may not be disclosed under a FOIA request. Since Exemption (j)(2) also covers requests for corrections, the denial of Wentz' request for correction of the allegedly inaccurate records also was proper.

Accordingly, the district court's decision granting the DEA's motion for summary judgment is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

No. 83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
PETITIONERS,

v.

DRUG ENFORCEMENT ADMINISTRATION
RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with case No. 83-1045, *United States Department of Justice, et al.* v. *Anthony Provenzano*, and a total of one hour is allotted for oral argument.

April 2, 1984

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No. 83-5878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED*

Whether the Privacy Act, 5 U.S.C. § 552a, constitutes a partial repeal of the Freedom of Information Act, 5 U.S.C. § 552, and thus constitutes the sole means by which individuals may seek disclosure of information about themselves that has been collected by federal law enforcement agencies, so that such individuals may categorically be denied access to information about themselves, in the unreviewable discretion of an agency head under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), while third-parties can be denied access to the same information only to the extent that parts of it may be exempt from disclosure, subject to judicial review, under the specific exemptions of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(b)(9).

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* Petitioners, who are individuals, were the only parties plaintiff in the district court. Respondent Drug Enforcement Administration, an agency of the federal government, was the only defendant below.

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130 Cong. Rec. H310-12 (daily ed. Jan. 31, 1984) 36

House Comm. on Gov't Operations and Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974*, 94th Cong., 1st Sess. (Jt. Comm. Print 1975) 6, 26

H.R. 16373, 93d Cong., 2d Sess. (1974) 21, 22

H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974) 26

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H.R. Rep. No. 1416, 93d Cong., 2d Sess. (1974) 10, 22, 30, 38

H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. (1976) 40, 43

H.R. Rep. No. 1441, 94th Cong., 2d Sess. (1976) ... 40, 41

Senate Comm. on Gov't Operations and House Comm. on Gov't Operations, *Legislative History of the Privacy Act of 1974, Source Book on Privacy*, 94th Cong., 2d Sess. (Jt. Comm. Print 1976) ..... *passim*

Senate Subcomm. on Admin. Practice and Procedure, Comm. on the Judiciary, *Report on Oversight Hearings on Agency Implementation of 1974 Amendments to the Freedom of Information Act*, 95th Cong., 2d Sess. (Comm. Print 1980) 35

S. 3418, 93d Cong., 2d Sess. (1974) 21, 22

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 10, 29

S. Rep. No. 1183, 93d Cong., 2d Sess. (1974) 10, 19

OTHER AUTHORITIES:

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Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596 (1976) 33

Davidson, *The Privacy Act of 1974—Exceptions and Exemptions*, 34 Fed. Bar J. 323 (1975) 24

1 K. Davis, *Ad. L. Treatise* § 5.43 (1982 Supp.) 13

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Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967) 10

Guidebook to the Freedom of Information and Privacy Acts (R. Bouchard & J. Franklin ed. 1980) 33

Hulett, *Privacy and the Freedom of Information Act*, 27 Ad. L. Rev. 275 (1975) 33

Note, *The Privacy Act of 1974: An Overview*, Duke L.J. 301 (1976) 33

Note, *FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict*, 8 Loy. U. Chi. L.J. 570 (1977) 33

2 J. O'Reilly, *Federal Information Disclosure Procedures, Forms and the Law* § 2013 (1981) 43

Project, *Government Information and Rights of Citizens*, 73 Mich. L. Rev. 971 (1975) 33

Report of Privacy Protection Study Comm'n, Privacy Act of 1974: An Assessment App. 4 (1977) 35

2A. C. Sands, *Sutherland Statutory Construction*,

§ 45.01 (4th ed. 1973) 12

§ 45.12 (4th ed. 1973) 20

§ 48.14 (4th ed. 1973) 24

10 Weekly Comp. of Pres. Docs. 1318 (October 17, 1974) 25, 26

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-69) is reported at 721 F.2d 215. The memorandum opinion of the district court (J.A. 47-52) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25 a) was entered on November 16, 1983. The petition for a writ of certiorari was filed on December 8, 1983, and granted on April 2, 1984 (J.A. 70). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

1. The Privacy Act And FOIA Requests.

In May 1981, Gregory J. Wentz, who was then a federal prisoner, filed a request under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, asking that the Drug Enforcement Administration ("DEA") provide him with copies of agency records pertaining to himself (J.A. 14-15). In July 1981, Mr. Wentz also requested disclosure of agency records used in preparing his pre-sentence report (J.A. 19). In March 1982, when DEA still had not acted on these requests, Mr. Wentz commenced this action in the United States District Court for the Western District of Wisconsin, to require release of the requested records (J.A. 3-6). In an amendment to his complaint, Mr. Wentz also sought the correction of certain errors he believed to be contained in those records (J.A. 29-31).

DEA eventually denied Mr. Wentz's requests in April 1982 (J.A. 27-28). The agency asserted (J.A. 27) that all of the

requested records were exempt from disclosure under the Privacy Act because they were contained in a system of records which the agency had exempted from disclosure by an administrative regulation promulgated under subsection (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2). Based on that regulation, DEA also asserted (J.A. 27) that the records were exempt from disclosure under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3).

In October 1981, Alfred B. Shapiro, who was then a federal prisoner, filed a similar request for disclosure of DEA records pertaining to himself (J.A. 40). In May 1982, when the agency still had not acted on his request, Mr. Shapiro brought suit in the United States District Court for the Western District of Wisconsin, to require disclosure of the requested records (J.A. 7-9). In June 1982, DEA advised Mr. Shapiro that the records he sought were contained in a system of records that had been exempted from disclosure by regulation and were therefore exempt from disclosure under both the Privacy Act and FOIA (J.A. 46).

2. The Decision Of The District Court.

DEA moved for summary judgment in both actions, based upon virtually identical affidavits (J.A. 10-13, 37-39) authored by Mr. Russ Arslan, a DEA official. Mr. Arslan asserted (J.A. 12-13, 38-39) that all of the requested records were contained in a system of records that had been exempted from disclosure by a regulation (28 C.F.R. § 16.98) promulgated under subsection (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2).

Mr. Wentz later moved in the district court for entry of an order requiring DEA to prepare an index of the records that had been withheld. *See Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The district court denied that motion on August 4, 1982 (J.A. 33-35).[1]

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[1] Although Mr. Shapiro made a similar motion (Shapiro O.R. Item 9), the record reflects no ruling on that motion.

On October 8, 1982, after the two cases had been consolidated, the district court granted DEA's motions for summary judgment (J.A. 47-52). The district court held (J.A. 50-51) that the requested records were exempt from disclosure under subsection (j)(2) of the Privacy Act because they were contained in a system of records which DEA had exempted from disclosure by regulation (28 C.F.R. § 16.98(c)). The district court further held (J.A. 50) that the Privacy Act is an exempting statute under Exemption 3 of FOIA (5 U.S.C. § 552(b)(3)), and that the records were therefore also exempt from disclosure under FOIA. Finally, the district court held (J.A. 52) that the exemption contained in subsection (j)(2) of the Privacy Act applies to the correction and civil enforcement provisions of the Act, 5 U.S.C. §§ 552a(d) and 552a(g). The court therefore concluded (J.A. 52) that the agency had correctly denied Mr. Wentz's request for relief under those provisions.[2]

3. The Decision Of The Court Of Appeals.

On November 16, 1983, the Seventh Circuit affirmed the judgments in both cases (J.A. 53-69).[3] First, the court held (J.A. 55-57) that the requested records were exempt from disclosure under the Privacy Act because the Arslan affidavits established that the records were contained in the agency's Investigative Reporting and Filing System, which, pursuant to the procedures mandated by subsection (j)(2) of the Act (5

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[2] The district court subsequently granted leave to appeal *in forma pauperis* (Pet. App. 31a-34a). The Seventh Circuit appointed counsel to present oral argument after Mr. Shapiro and Mr. Wentz had filed *pro se* briefs.

[3] In doing so, the Seventh Circuit followed its own prior decision in *Terkel* v. *Kelly*, 599 F.2d 214 (1979), *cert. denied*, 444 U.S. 1013 (1980), and the Fifth Circuit's decision in *Painter* v. *FBI*, 615 F.2d 689 (1980). The Seventh Circuit also expressly rejected the contrary holdings of the Third Circuit in *Porter* v. *U.S. Dept. of Justice*, 717 F.2d 787 (1983), and *Provenzano* v. *U.S. Dept. of Justice*, 717 F.2d 799, *reh. denied*, 722 F.2d 36 (1983), *cert. granted*, No. 83-1045 (Apr. 2, 1984), as well as the contrary holding of the District of Columbia Circuit in *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (1982).

U.S.C. § 552a(j)(2)), had been exempted from disclosure by regulation (28 C.F.R. § 16.98(c)).

Second, the Seventh Circuit held that DEA was not required to prepare a *Vaughn* index because subsection (j)(2) of the Privacy Act, unlike the particularized exemptions of FOIA (5 U.S.C. § 552(b)), applies to entire systems of records (J.A. 57). Once it has been established that the requested information is contained in a system of records that has been exempted from disclosure in compliance with the procedural requirements of subsection (j)(2), the court reasoned, there is no purpose to be served by a *Vaughn* index because no further judicial inquiry is required (J.A. 57-58).

Third, the Seventh Circuit held that the requested records were also exempt under FOIA because " 'that . . . Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt' " (J.A. 59, *quoting Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980)). The court noted that FOIA Exemption 3 "provides that the FOIA does not apply to information 'specifically exempted' by other statutes" (J.A. 58, *quoting* 5 U.S.C. § 552(b)(3); footnote omitted). Since it found that the Privacy Act constitutes an exempting statute under FOIA Exemption 3, the court concluded that disclosure was not required by FOIA (J.A. 60).

As the Seventh Circuit noted, however, "to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must 'leave no discretion on the issue' of disclosure, or must establish 'particular criteria for withholding' or refer to 'particular types of matters to be withheld' " (J.A. 60, *quoting* 5 U.S.C. § 552(b)(3)). While recognizing that subsection (j)(2) of the Privacy Act grants unfettered discretion to certain agencies to exempt certain "system[s] of records within the agency from [the disclosure and other requirements of] any part of [the Privacy Act]" (5 U.S.C. § 552a(j)(2)), the court nonetheless held that this provision is sufficient under FOIA Exemption 3 to exempt such records from disclosure under both statutes

(J.A. 69). The court further held that "[s]ince [subsection] (j)(2) also covers requests for corrections, the denial of Wentz's request for correction of the allegedly inaccurate records also was proper" (J.A. 69).

Although the Seventh Circuit recognized that subsection (b)(2) of the Privacy Act (5 U.S.C. § 552a(b)(2)) specifically preserves FOIA disclosure rights, the court held that this provision applies only to so-called "third-party requests," that is, to requests by persons who are seeking access to information about others, rather than themselves (J.A. 62). In the court's view (J.A. 62), first-party requesters may seek disclosure only under subsection (d) of the Privacy Act (5 U.S.C. § 552a(d)), and the access rights created by that subsection may therefore be withdrawn by administrative regulation under subsection (j).

SUMMARY OF ARGUMENT

The central question presented in this case is whether Congress intended, when it enacted the Privacy Act, 5 U.S.C. § 552a, to abrogate the established right of individual citizens to seek disclosure under FOIA, 5 U.S.C. § 552, of government records pertaining to themselves. In holding that Congress intended that result, the Seventh Circuit disregarded the plain language and legislative history of both statutes. The judgment below should therefore be reversed.

Although FOIA and the Privacy Act both mandate disclosure of government records, the two statutes are somewhat different in purpose and scope. The central purpose of FOIA is to ensure "access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). By contrast, the central purpose of the Privacy Act is to "provide certain safeguards for an individual against an invasion of personal privacy" by controlling the collection, main-

tenance, use and dissemination of individually identifiable records (PA Source Book 501 (Pub.L. 93-579, § 2 (1974))).[4]

Under FOIA, "any person," regardless of his identity and without any showing of special need, may obtain disclosure of government records, except to the extent that they are exempt from disclosure under one of the nine specific exemptions created by FOIA (5 U.S.C § 552). In the event that part of a record is exempt, the remainder must be disclosed (5 U.S.C. § 552(b)). By contrast, the Privacy Act grants, to certain individuals who are the subjects of government records, certain special access, correction, and other rights (5 U.S.C. § 552a(d)), with respect to records "from which information is retrieved by the name [or other personal identifier] of the individual" (5 U.S.C. § 552a(a)(5)). Unlike FOIA, the Privacy Act grants certain agencies unfettered discretion to exempt certain "system[s] of records within the agency" from these special requirements (5 U.S.C. § 552a(j)). However, this exemptive authority is specifically limited to the access, correction, and other provisions of "this section," that is, the Privacy Act itself. Subsection (j) cannot therefore be construed to authorize the withholding of any information that would otherwise be required to be disclosed under FOIA. That result is consistent with the central purpose of the Privacy Act, which is to protect personal privacy, not government secrecy. Moreover, subsection (b)(2) of the Privacy Act expressly preserves the rights of "any person [to] the disclosure[s] . . . required [by FOIA]" (5 U.S.C. § 552a(b)(2)). Similarly, subsection (q) of the Privacy Act (5 U.S.C. § 552a(q)) provides that the exemptions contained in FOIA may not be used to block any disclosure required to be made under the Privacy Act. Together, these subsections plainly evidence Congress's intention that the dis-

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[4] "PA Source Book" refers to Senate Comm. on Gov't Operations and House Comm. on Gov't Operations, *Legislative History of the Privacy Act of 1974, Source Book on Privacy*, 94th Cong., 2d Sess. (Jt. Comm. Print 1976). "FOIA Source Book" refers to House Comm. on Gov't Operations and Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974*, 94th Cong., 1st Sess. (Jt. Comm. Print 1975).

closure rights created by the two statutes should be deemed complementary and cumulative.

The Seventh Circuit acknowledged (J.A. 62) that subsection (b)(2) of the Privacy Act preserves the disclosure rights created by FOIA, but held that those rights are preserved only for "third-party requesters", that is, parties seeking information about other persons. The court below based this conclusion on the view that Congress intended subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) to constitute the sole means by which "first-party requesters," persons seeking access to government records concerning themselves, may seek such disclosure. But neither the language nor the legislative history of subsection (d)(1) evidences any such intention. Moreover, Congress's deliberate use in subsection (b) of the comprehensive term "any person," the same term used in FOIA itself, is plainly inconsistent with any such intention. Finally, the Seventh Circuit's construction is contrary to the special solicitude which Congress showed for individual citizens and resident aliens, for whose especial benefit the Privacy Act was enacted (5 U.S.C. § 552a(a)(2)). Since the Seventh Circuit's construction does not affect the FOIA rights of third-parties to seek individually identifiable records pertaining to others, this construction creates a preferred position for third-party requesters. This construction also creates a preferred position for business entities and foreign nationals, whose rights under FOIA to seek access to government records pertaining to themselves are clearly unaffected by the Privacy Act, which has no application to them.

The legislative history of both statutes further demonstrates that Congress did not intend to abrogate first-party FOIA access when it enacted the Privacy Act. Subsection (b)(2) of the Privacy Act, which explicitly preserves the FOIA access rights of "any person," was reinserted in the final version of the Privacy Act to satisfy the Senate's demand that the "status quo" be preserved with respect to the disclosure of personal information under FOIA (PA Source Book 861 (120 Cong. Rec. 40405 (1974)) (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act)). The "sta-

tus quo" was, of course, that "any person," whether a first-party or a third-party requester, was entitled to disclosure of any government records that were not exempt from disclosure under one of the nine specific FOIA exemptions (5 U.S.C. § 552(b)(1)-(b)(9)).

The Seventh Circuit's construction can stand only if the Privacy Act (a) constitutes a partial, implied repeal of FOIA, or (b) is a FOIA Exemption 3 statute. The Privacy Act is neither of these. First, the Privacy Act does not satisfy the stringent requirements of a repeal by implication because Congress manifested no such intent and the two statutes are not irreconcilable. Indeed, the plain language of the Privacy Act evidences Congress's intention to preserve the complementary rights created by the two statutes. *See* 5 U.S.C. §§ 552a(b)(2) and 552a(q). Second, the Privacy Act is not a FOIA Exemption 3 statute. Since the Privacy Act specifically preserves FOIA access for "any person," and the reach of the Privacy Act's exemptions is expressly limited to the Privacy Act itself, records that have been administratively exempted from the access and other provisions of the Privacy Act cannot be deemed "specifically exempted from disclosure by statute" under FOIA (5 U.S.C. § 552(b)(3)). Indeed, subsection (j) of the Privacy Act does not even exempt records "by statute" because it merely authorizes agencies, if they wish, to create exemptions by regulation. The statute itself exempts nothing from disclosure.

Moreover, to qualify under Exemption 3, a statute must "(A) require[ ] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish[ ] particular criteria for withholding or refer [ ] to particular types of matters to be withheld" (5 U.S.C. § 552(b)(3)). Subsection (j) of the Privacy Act meets neither of these requirements. First, it does not meet the requirements of proviso (A) because it is wholly discretionary and does not "require" any withholding. In addition, subsection (j) fails to exempt the disclosure of records "from the public" because its exemptive authority is limited to first-party requests. The same records admittedly may be disclosed "to the public"

under FOIA. Second, subsection (j) does not meet the particularity requirements of proviso (B) because it allows agencies to withhold entire systems of records. It neither establishes "particular criteria for withholding" nor "refers to particular types of matters to be withheld."

ARGUMENT

I.

THE PRIVACY ACT EXPLICITLY PRESERVES THE FULL ACCESS RIGHTS AVAILABLE TO ALL REQUESTERS UNDER FOIA.

It is beyond dispute that the Privacy Act does not affect the rights of third parties to invoke the provisions of FOIA to seek access to government records pertaining to other persons. *See* J.A. 62. Similarly, the Privacy Act cannot affect the rights of business entities and non-resident aliens to invoke the provisions of FOIA to seek government records, pertaining either to themselves or to third parties, because the Privacy Act has no application to such persons. *See* 5 U.S.C. § 552a(a)(2). The question involved here is whether the Privacy Act categorically precludes individual citizens and resident aliens from invoking FOIA to seek disclosure of government records pertaining to themselves. The Seventh Circuit held (J.A. 62) that the Privacy Act provides the exclusive means by which such individuals may seek access to information about themselves. That holding is contrary to the explicit language of both statutes.

A. The Privacy Act Specifically Preserves The Full Disclosure Rights To Which "Any Person" May Be Entitled Under FOIA.

Prior to the enactment of FOIA in 1966, government agencies had broad discretion to withhold government records. *See* 5 U.S.C. § 1002 (1946). Because of the extent to which agencies had exercised that discretion, Congress enacted FOIA to ensure "access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling

official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). FOIA "establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). *See also* H.R. Rep. No. 1497, 89th Cong. 2d Sess. 1-6 (1966). Under FOIA, records must therefore be disclosed, except to the extent that they are exempt from disclosure on one of nine specific statutory grounds (5 U.S.C. § 552(b)(1)-(b)(9)).

Disclosure of government records under FOIA is specifically made available to "any person" (5 U.S.C. § 552(a)(3)), which includes any "individual, partnership, corporation, association, or public or private organization other than an agency" (5 U.S.C. § 551). Prior to the enactment of FOIA, a party seeking disclosure of government records was required to show that he was "a person directly and properly concerned" (5 U.S.C. § 1005 (1946)). When Congress enacted FOIA in 1966, it deliberately omitted that requirement so that a requester need not now show any particularized interest in or need for the requested records. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 765 (1967). Thus, FOIA affords no basis for distinguishing between persons requesting records pertaining to themselves ("first-party requesters") and those requesting records pertaining to other persons ("third-party requesters").

Like FOIA, the Privacy Act is a remedial statute. It was enacted in 1974 for the special purpose of reforming the manner in which certain agency records—those "from which information is retrieved by the name [or other personal identifier] of the individual" (5 U.S.C. § 552a(a)(5))—are compiled, maintained, and disclosed. *See* S. Rep. No. 1183, 93d Cong., 2d Sess. 2 (1974); H.R. Rep. No. 1416, 93d Cong., 2d Sess. 2 (1974). The purpose of the Privacy Act is not to promote government secrecy, but to protect "individual privacy by controlling the collection, management and dissemination of individually identifiable records" (PA Source Book 1187 (121 Cong. Rec. 32893 (1975)) (Congressional Research Service Memorandum)). With respect to such individually identifiable

records, subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) grants special access rights to those subjects of government records who are American citizens or permanent resident aliens (5 U.S.C. § 552a(a)(2)). The purpose of these special access rights, which are separate in purpose and operation from the more general disclosure rights created by FOIA, is to provide the means by which subjects of government records can enforce the other rights to which they are entitled under the Privacy Act.[5]

FOIA and the Privacy Act both require disclosure of government records in certain circumstances, and "[e]ach seeks in different ways to respond to the potential excesses of government." *Greentree* v. *U.S. Customs Service*, 674 F.2d 74, 76 (D.C. Cir. 1982). But the specific purposes of the two statutes are different. It is not surprising, therefore, that the Privacy Act contains two savings provisions, which plainly manifest Congress's intention that the disclosure rights created by the

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[5] The various provisions of the Privacy Act are designed to further the central statutory purpose of ensuring the privacy and accuracy of those agency records that are retrievable through the name or other personal identifier of the subject individual. Other provisions of subsection (d) permit the subject of such records to challenge their accuracy, petition for their correction, and require the agency to include a statement of the subject's disagreement in any materials that are disclosed (5 U.S.C. § 552a(d)). Subsection (b) prohibits agency disclosure of records concerning individuals except in specified circumstances (5 U.S.C. § 552a(b)). Subsection (c) requires each agency to keep and make available to the subject individual an account of all public and interagency disclosures under the Privacy Act of records relating to the individual (5 U.S.C. § 552a(c)). Subsection (e) establishes a variety of stringent record gathering, record keeping, and notice requirements for agencies which maintain individual records (5 U.S.C. § 552a(e)). Subsections (g) and (i) provide for civil and criminal remedies, respectively, when agency officials have failed to comply with the requirements of the statute (5 U.S.C. §§ 552a(g) and (i)). Subsections (l) through (n) establish rules for the handling of specialized types of individual records (5 U.S.C. §§ 552a(l)-(n)).

two statutes should be deemed complementary and cumulative. First, Congress provided in subsection (q) that "[n]o agency shall rely on any [FOIA] exemption . . . to withhold from any individual any record which is otherwise accessible to such individual under the provisions of [the Privacy Act]" (5 U.S.C. § 552a(q)). Thus, the limited and specialized access mandated by subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) cannot be blocked by any exemption from disclosure contained in FOIA. Second, in subsection (b)(2) of the Privacy Act (5 U.S.C. § 552a(b)(2)), Congress expressly preserved the disclosure rights of "any person" entitled to disclosure under FOIA.[6] Like FOIA, subsection (b)(2) of the Privacy Act explicitly applies to "any person" and affords no basis for distinguishing between first-party and third-party requests. Contrary to the holding below (*see* J.A. 62), the language of subsection (b)(2) is plain, and it does not purport to protect the disclosure rights only of "any person other than a first-party requester." Congress's use, in both statutes, of the term "any person" is not accidental, and that term must be accorded its plain meaning in both statutes. *See CPSC* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); *Caminetti* v. *United States*, 242 U.S. 470, 485-86 (1917); 2A C. Sands, *Statutes and Statutory Construction* § 45.01 (4th ed. 1973).[7]

Thus, the District of Columbia Circuit correctly rejected the reasoning adopted by the Seventh Circuit in the case at bar, holding that "section (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 79 (emphasis in original). *See also Crooker* v. *U.S.*

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[6] In pertinent part, subsection (b) provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—* * * (2) required under section 552 of this title" (5 U.S.C. § 552a(b)(2)).

[7] Significantly, the same definition of "person" applies under both the Privacy Act and FOIA. *See* 5 U.S.C. § 551.

Parole Comm., 730 F.2d 1, 10 (1st Cir. 1984) ("the Privacy Act by its terms cannot justify withholding information where the FOIA requires disclosure"). In reaching the contrary conclusion, the court below did not construe the Privacy Act, but rewrote it to conform to certain policy arguments advanced by the government. Thus, by focusing solely upon the access provisions of the Privacy Act, the Seventh Circuit concluded that the construction adopted in *Greentree* "would result in an emasculation of Privacy Act Exemption (j)(2)," the scope of which "thus would be limited to the scope of any applicable FOIA exemptions" (J.A. 63). The court's reasoning is incorrect, however, because FOIA exemptions are exemptions from disclosure, while Privacy Act exemptions may supersede several additional rights granted by the Privacy Act, including the recordkeeping and correction provisions. *See* pages 31-32, *infra*.*

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* The Seventh Circuit rested its holding on its perception of Congress's general concern "that individuals not be permitted access to certain records containing information about their own criminal investigations" (J.A. 63). In these circumstances, such a generalized concern cannot provide a true compass for ascertaining Congress's intent. *See CPSC* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). Moreover, the focus of Congress's concern was specifically directed to assuring that first-parties would not, as a result of the Privacy Act, have greater access to such investigatory materials than they already had under FOIA. Congress satisfied that concern in a specific way by including subsection (j), which plainly allows certain agencies to exempt systems of records from the *special* access, record-keeping and correction provisions of the Privacy Act itself. Congress's general concern certainly cannot overcome the specific language of subsection (j), which is limited in its scope to "this section," that is, to the Privacy Act itself. *See* K. Davis, *Ad. Law Treatise* § 5.43 at 100 (1982 Supp.) *See also* pages 15-16, *infra*. Indeed, there is nothing in the language or legislative history of the Privacy Act to suggest that Congress also intended, with respect to first-party requests for such materials, to create a barrier to disclosure higher than that which it had painstakingly crafted only a few weeks before, when it amended FOIA Exemption 7, 5 U.S.C. § 552(b)(7). *See* pages 25-27, *infra*. Finally, the legislative history upon which the Seventh Circuit relied (J.A. 63-64) in reaching the opposite conclusion is wholly inapposite

The reasoning adopted by the Seventh Circuit was properly rejected by the *Greentree* court, which held that "we are not at liberty to limit the safeguards of (b)(2), which extend to requests by 'any person' " (674 F.2d at 79). As the *Greentree* court recognized, the only conceivable purpose to be served by subsection (b)(2) is to preserve FOIA disclosure rights for all requesters (674 F.2d at 79). If Congress had intended the Privacy Act to constitute the sole means of access for first-party requesters, it surely would not have included this unqualified reservation of FOIA access in subsection (b)(2). *Accord Porter* v. *U.S. Dept. of Justice*, 717 F.2d 787, 794 (3d Cir. 1983).[9]

In reaching the contrary conclusion (J.A. 62), the Seventh Circuit also misconstrued the clause in Privacy Act subsection (b) which prohibits disclosure under the Privacy Act "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." This clause has no application, of course, where "disclosure of the [requested] record would be . . . required under [FOIA]" (5 U.S.C. § 552a(b)(2)). Relying exclusively on this clause, however, the Seventh Circuit erroneously concluded (J.A. 62) that subsection (b)(2) preserves only third-party disclosure rights under FOIA. But this clause merely conditions disclosure under the Privacy Act—in those circumstances in which disclosure is not required by FOIA—on the making of a *written* first-party request or the filing of a *written* first-party consent.

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because it relates to prior versions of the bill, which were not enacted.

[9] Other provisions of the Privacy Act confirm Congress's intention that the rights created by the two statutes should be considered separately. For example, agencies need not comply with the disclosure accounting provisions of the Privacy Act, 5 U.S.C. § 552a(c)(1), when, under FOIA, they disclose records which otherwise would be subject to those provisions. Similarly, when disclosure is made under FOIA, agencies need not comply with the requirement of subsection (e)(6) of the Privacy Act, 5 U.S.C. § 552a(e)(6), that they establish the accuracy, completeness, timeliness and relevance of records prior to their disclosure.

The clause permits agencies to release records pursuant to either a first-party or third-party request, but requires in either case that the subject of the records manifest his consent in writing.[10] In sum, there is no basis for contending that subsection (b)(2) preserves FOIA disclosure rights only for the third-party requesters.

B. The Exemptions Contained In The Privacy Act Cannot Provide Any Basis For Precluding Disclosure Under FOIA Because Their Applicability Is Expressly Limited To The Privacy Act Itself.

The explicit reservation of FOIA access to "any person" in subsection (b)(2) is reinforced by the language used in the exemption subsections of the Privacy Act. Subsections (j) and (k) permit certain agencies to promulgate rules "to exempt any system of records within the agency from any part of *this section*." 5 U.S.C. §§ 552a(j) and 552a(k) (emphasis added). Subsections (j) and (k) plainly authorize agencies to exempt systems of records from the access, correction, and certain other requirements of the Privacy Act, but not from the disclosure requirements of FOIA. Congress's use of the words "this section" was not inadvertant. Congress clearly intended to limit the scope of these exemptions to Section 552a, the Privacy Act itself. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 79. If Congress had intended to authorize agencies to

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[10] Unlike FOIA, subsection (b) of the Privacy Act conditions the release of individually identifiable records upon the presentation of a *written* request. The rationale for this additional requirement is rooted in the divergent purposes and schemes of the two statutes. Under FOIA, of course, the requester's identity is immaterial because disclosure depends upon the nature of the requested records, not the identity of the requester. Under the Privacy Act, however, the requester's identity is crucial. In response to Privacy Act requests, government agencies therefore insist on the making of some verification that the subject of the records has either made the request himself or has actually authorized the release of the records to a third-party requester. This verification process is well illustrated by DEA's handling of the requests made by Mr. Wentz and Mr. Shapiro. *See* J.A. 16-17, 41-42.

exempt themselves from the requirements of FOIA, Congress certainly would not have used the language it did. When Congress intended to refer to FOIA in other parts of the Privacy Act, it did so explicitly. *See* 5 U.S.C. §§ 552a(b)(2) and 552a(q). Moreover, when Congress intended in the Privacy Act to refer to other parts of Title 5, such as FOIA, it used the term "this title." *See* 5 U.S.C. §§ 552a(j) and 552a(q). *See also Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797 ("Had Congress intended to authorize the creation by regulation of exemptions from [FOIA] it would have used language such as 'this title' rather than 'this section' ").

Nor does Congress's use of the term "this section" lend any support to the contention that Congress intended the Privacy Act to constitute the exclusive means by which first-party requesters may seek access to records pertaining to themselves. Subsection (j) specifically provides that agencies may promulgate administrative exemptions "from any part of this section *except subsection[ ](b), . . .*" (5 U.S.C. § 552a(j)). Thus, the express reservation of unqualified FOIA access established in subsection (b)(2) of the Privacy Act is explicitly incorporated in subsection (j), which cannot therefore be construed to authorize agencies to promulgate any rules that would nullify the FOIA disclosure rights of "any person."[11]

C. The Language Of Subsection (d)(1), The First-Party Access Provision Of The Privacy Act, Manifests No Congressional Intention That The Privacy Act Should Be The Sole Means Of First-Party Access.

Despite the Privacy Act's express reservation to "any person" of the disclosure rights granted by FOIA (5 U.S.C. § 552a(b)(2)), and the express limitation of its exempting authority to the other provisions of the Privacy Act itself (5

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[11] Significantly, each of the exceptions to the exempting authority granted by subsection (j) relates to other provisions of the Privacy Act. This fact reinforces the conclusion that the Privacy Act exemptions are self-contained and are not intended to affect any disclosure mandated by other statutes. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 79.

U.S.C. §§ 552a(j) and 552a(k)), the Seventh Circuit held (J.A. 62) that subsection (d)(1) supersedes FOIA access with respect to first-party requests by American citizens and resident aliens. *See* pages 18-20, *infra*. Neither subsection (d)(1) nor any other provision of the Privacy Act evidences any congressional intention that this subsection is to be the sole statutory vehicle for first-party access to government records. "There is not a word in that [subsection] suggesting that the special remedy which it provides for the vindication of privacy rights which Congress identiied in its legislative findings was to be exclusive of all other rights which the law might elsewhere provide." *Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797.

The meaning of any statutory provision must be ascertained in light of its statutory context. *Chemeheuvi Tribe of Indians* v. *FPC*, 420 U.S. 395, 403 (1975); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). The context of subsection (d)(1) within the Privacy Act further demonstrates that it was not intended to be the sole means of first-party access to records.

Unlike FOIA, the central purpose of the Privacy Act is not to guarantee disclosure of government records, but to assure individual privacy and the accuracy of individually indentifiable government records. Thus, the access permitted by subsection (d)(1) is not an end in itself, but a means to assuring the privacy and accuracy of such records. Such access is obviously an essential prerequisite to enforcing the other rights granted by the Privacy Act, most of which presuppose the individual's familiarity with the contents of agency records. *See* 5 U.S.C. §§ 552a(d)(2)-(d)(4), (g)(1)(A). *See also* PA Source Book 888, 915 (120 Cong. Rec. 36648, 36657 (1974) (remarks of Rep. Erlenborn)); *Binion* v. *U.S. Dept. of Justice*, 695 F.2d 1189, 1192 (9th Cir. 1983). Subsection (d)(2) provides that an individual who has reviewed his records may "request amendment of a record pertaining to him." Under subsection (d)(3), an individual who disagrees with an agency official's refusal to amend his record may request further administra-

tive review, and may ultimately seek judicial review under subsection (g)(1)(A). Subsection (d)(4) requires that an agency must include an individual's statement of disagreement in any disclosure of the individual's record.

Thus, the context of subsection (d)(1) demonstrates that this narrow record review provision is an integral part of a statutory scheme designed to assist individuals in assuring the privacy and accuracy of government records pertaining to themselves.[12] Clearly, this provision, which exists for that specific and limited purpose, is designed to supplement rather than supersede first-party disclosure under FOIA.

D. The Construction Adopted By The Court Below Leads To Anomalous Results And Unenforceable Prohibitions.

A statute should not be interpreted in a manner that leads to incongruous results (*Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956)), but the Seventh Circuit's construction turns the Privacy Act on its head by creating a disadvantage for those persons for whose especial benefit the statute was enacted. By construing the Privacy Act as the sole means of first-party access for American citizens and resident aliens (5 U.S.C. § 552a(a)(2)), the Seventh Circuit has created a preferred position for third-parties seeking access to the same records. Under the Seventh Circuit's reasoning, an agency may deny a first-party request whenever the requested records are located within a system of records which has been exempted from disclosure under subsection (j) of the Privacy Act. This exemption from disclosure is categorical and applies to the entire "system of records," without regard to the character of any particular record. On judicial review, the only relevant question is whether the system of records was properly exempted.

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[12] The link between the access and amendment provisions of the Privacy Act is further evidenced by the analogous proximity between the two subsections which permit an individual to enforce these rights in court. *See* 5 U.S.C. §§ 552a(g)(1)(A)-(g)(1)(B).

By contrast, a third-party requester retains the right to seek the same records under FOIA. In that case, the agency must index the records, tender any "reasonably segregable portions" of records which are not exempt under subsection (b) of FOIA (5 U.S.C. § 552(b)), and defend in court any exemption which it wishes to assert with respect to any other portions of such records (5 U.S.C. § 552(a)(4)(B)). Thus, for example, a third-party FOIA requester could obtain law enforcement records concerning an individual, to the extent that they are not exempt from disclosure on one of the narrow grounds established in FOIA Exemptions 6 and 7 (5 U.S.C. § 552(b)(6)-(b)(7)), but the same records could be categorically withheld from the subject under subsection (j)(2) of the Privacy Act (5 U.S.C. § 552a(j)(2)). This construction, which affords greater substantive and procedural rights to third-parties, has been characterized by courts and commentators as the "third-party anomaly." *See, e.g., Greentree* v. *U.S. Customs Service*, 674 F.2d at 79. It is certainly inconsistent with the principal purpose of the Privacy Act.

The Seventh Circuit's construction gives rise to a second anomaly. The provisions of the Privacy Act are applicable only to "individuals," which are defined as American citizens and permanent resident aliens (5 U.S.C. § 552a(a)(2)). The term does not include business entities or foreign nationals. *See* PA Source Book 232 (S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974)). However, FOIA disclosure is available to "any person," which includes "an individual, partnership, corporation, association, or public or private oganization other than agency" (5 U.S.C. § 551(2)). For purposes of FOIA, the term "person" includes business entities and foreign nationals. *Kent Corp.* v. *NLRB*, 530 F.2d 612, 616 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Raven* v. *Panama Canal Co.*, 583 F.2d 169, 171 (5th Cir. 1978), *cert. denied*, 440 U.S. 1044 (1979); *Neal-Cooper Grain Co.* v. *Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974).

These definitions plainly manifest Congress's intent that this limited class of natural persons—American citizens and permanent resident aliens—should be afforded greater disclosure rights than business entities and foreign nationals.

Under the Seventh Circuit's construction, however, the opposite is true. By holding that the Privacy Act is the sole means of first-party access for American citizens and permanent resident aliens, the Seventh Circuit has created a preferred position for foreign nationals and business entities. The latter must be afforded access to government records concerning themselves, subject only to the nine specific and limited FOIA exemptions, while American citizens and permanent resident aliens will be denied access to analogous records whenever an agency has determined to place those records in a system of records which has been exempted from disclosure under subsection (j) of the Privacy Act (5 U.S.C. § 552a(j)). *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 795.

Finally, the Seventh Circuit's construction is impracticable. As the *Greentree* court recognized, the construction adopted by the Seventh Circuit places a premium on chicanery since the barrier to first-party disclosure may be avoided by requisitioning a surrogate to act as a third-party FOIA requester (674 F.2d at 79). "It cannot be presumed that the legislature would do a futile thing." 2A C. Sands, *Sutherland Statutory Construction* § 45.12 at 37 (4th ed. 1973). Congress surely could not have intended that the vindication of such important rights should be made to depend upon the willingness of individual requesters, most of whom will not have legal counsel to assist them. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *Love* v. *Pullman*, 404 U.S. 522, 527 (1972). Nor could Congress have intended that federal agencies and the judiciary should expend scarce resources in determining whether a particular FOIA request was made by a genuine third-party requester, rather than by an accommodation party acting in lieu of a first-party requester. *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 795. *See generally Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Del Toro*, 513 F.2d 656, 662 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975).

II.

THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND THAT THE PRIVACY ACT SUPPLANT THE DISCLOSURE RIGHTS OF FIRST-PARTY REQUESTERS UNDER FOIA.

The legislative history of the Privacy Act and FOIA further confirm that Congress did not intend to abolish first-party FOIA access by enacting the Privacy Act.

A. Congress Intentionally included Language In The Privacy Act To Ensure That The Exemptions Contained In Each Act Would Be Self-Contained.

The legislative history of the Privacy Act further evidences that subsection (b)(2) was inserted for the purpose which its language manifests, that is, to assure that the Privacy Act would not be construed to alter the disclosure rights which FOIA grants to "any person," including first-party requesters. Prior to its enactment, the Privacy Act underwent several changes as the two Houses debated the proper scope of the Act. Among other things, the two Houses debated the question whether the Privacy Act should constitute the sole means for securing access to individually identifiable government records. That debate was resolved by Congress's inclusion of subsection (b)(2), which unequivocally preserves FOIA access for all requesters.

The final Senate version of the privacy bill passed the Senate on November 22, 1974 (PA Source Book 375 (H.R. 16373 as amended by the Senate)). That version contained subsection 205(b), which had been included by the Senate Committee on Government Operations for the express purpose of preserving the full disclosure rights created by FOIA and other disclosure statutes. Subsection 205(b) provided that: "[n]othing in this Act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder" (PA Source Book 143, 365 (S. 3418, 93d Cong., 2d Sess. (1974)). Subsection 205(b) of the Senate bill, which is a less specific precursor of subsection

(b)(2) of the enacted bill, was specifically intended to recognize continued FOIA disclosure rights for all requesters (PA Source Book 861 (120 Cong. Rec. 40405 (1974) (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act)). To further ensure the separation of the FOIA and Privacy Act exemptions, the Senate version also included a complementary provision, subsection 205(a), which explicitly provided that the exemptions contained in FOIA would not preclude the granting of any access otherwise available under the Privacy Act (PA Source Book 143, 364-65 (S. 3418, 93d Cong., 2d Sess. (1974))).

The version of the House bill that was originally introduced and referred to the House Committee on Government Operations contained subsection (b)(2) in virtually the same form in which it was later enacted by both Houses (PA Source Book 242-43 (H.R. 16373, 93d Cong., 2d Sess. 4-5 (1974))). Subsection (b)(2) was deleted by the House Committee on Government Operations, however, for the specific purpose of displacing FOIA as a means of obtaining access to records pertaining to individuals (PA Source Book 306 (H.R. Rep. No. 1416, 93d Cong., 2d Sess. 13 (1974))). The privacy bill which was finally reported by the House Committee on Government Operations was focused, more singularly than either the Senate bill or the original House bill, on preserving individual privacy (PA Source Book 437 (S. 3418 as amended by the House)). Thus, the final House version of the bill, which passed the House on December 11, 1974, contained neither the eventually-enacted subsection (b)(2) nor any other provision analogous to subsection 205(b) of the Senate bill.

On December 17, 1974, the Senate passed the final House version, after amending it in several respects (PA Source Book 459 (S. 3418 as amended by Senate)). Among other things, the Senate inserted subsection (b)(2) in its current form (*id.*). Representatives of both Houses subsequently perfected a compromise bill, which was principally based on the House version. However, the House receded on two important points (PA Source Book 501 (Pub. L. No. 93-579 (1974))). *See also* 120 Cong. Rec. 40400 (1974).

First, subsection (b)(2) of the original House version was reinserted to ensure that the Privacy Act exemptions could not be invoked to block disclosure to "any person" under FOIA (PA Source Book 501 (Pub. L. No. 93-579, § 3, 93d Cong., 2d Sess. (1974))). Second, subsection (q) was adopted from the final Senate version to assure that the FOIA exemptions could not be invoked to withhold any records otherwise available under the Privacy Act (PA Source Book 510 (Pub. L. No. 93-579, § 3 (1974))). *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 83. The simultaneous insertion of these two amendments demonstrates that Congress made a conscious choice to ensure that the disclosure rights granted by each statute would be complementary and cumulative. As the *Greentree* court concluded, "throughout its consideration of the Privacy Act, the Senate struggled to hold separate the Privacy Act and FOIA, and . . . that effort was ultimately succesful" (674 F.2d at 81).

Senator Ervin, the Senate floor manager, explained the compromise bill to the Senate. He summarized the outcome of the compromise, stating that: "We preserve most of the essential elements of the Senate bill with these few minor changes" (PA Source Book 857 (120 Cong. Rec. 40405 (1974))). Senator Ervin then published a written analysis to the Senate. This analysis, which was also published to the House (PA Source Book at 987), stated (*id.* at 861 (120 Cong. Rec. 40406 (1974)); emphasis added):

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual *unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by courts regarding the disclosure of personal information under [FOIA].*[13]

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[13] A formal conference report was not prepared, presumably because the Privacy Act was enacted in the closing days of the Ninety-third Congress and the time for preparing such a report did not exist. *See Exner* v. *FBI*, 612 F.2d 1202, 1206 n.9 (9th Cir. 1980). However,

Prior to the enactment of the Privacy Act, the "status quo" was that "any person" could invoke the provisions of FOIA to seek access to government records. *See, e.g., Hawkes* v. *IRS*, 467 F.2d 787 (6th Cir. 1972). The "status quo" admitted no distinction between first-party and third-party requests. Thus, the compromise bill preserved all existing FOIA access.[14]

The analysis presented by Senator Ervin also recognized that Privacy Act subsection (q), which provides that the FOIA exemptions may not be used to bar any disclosure mandated by the Privacy Act, is a companion provision to subsection (b)(2). The symmetrical purposes of the two provisions were clearly explained (PA Source Book 861 (120 Cong. Rec. 40406 (1974))):

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the staff analysis which Senator Ervin used to explain the compromise bill is analogous to a formal conference report because it was prepared for the Senate managers of the bill, was used by them to explain the provisions of the compromise bill to the Senate, and was relied on by the House managers during the floor debates (*see* PA Source Book 987 (120 Cong. Rec. 40881 (1974))). Since this analysis represents the only systematic explanation of the compromise bill that was presented to both Houses, it is entitled to substantial weight as evidence of Congress's intent. In any event, statements by a committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports." 2A C. Sands, *Sutherland Statutory Construction* § 48.14 at 220 (4th ed. 1973). As floor manager of the bill, Senator Ervin was uniquely qualified to explain the compromise bill and had a special responsibility to do so. *See Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-16 (1976); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Doherty* v. *United States*, 404 U.S. 28, 34 (1971) (Douglas, J., concurring); *Duplex Co.* v. *Deering*, 254 U.S. 443, 475 (1921) (all referring to sponsor's or committee chairman's explanations).

[14] Similarly, the purpose of subsection (b)(2) was explained by James Davidson, Counsel to the Senate Government Operations Subcommittee on Intergovernmental Relations, who played a key role in shaping the compromise legislation: "if information about an individual would be released under an FOI Act request, it could be released under b(2) of the Privacy Act" (PA Source Book 1191-92 (Davidson, *The Privacy Act of 1974-Exceptions and Exemptions*, 34 Fed. Bar J. 323, 324 (1975))).

> A related amendment taken from the Senate bill would prohibit any agency from relying upon any exemption contained in [FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [the Privacy Act].

Senator Evin's explanation clearly demonstrates that Congress consciously decided that neither the exemptions of the Privacy Act nor those of FOIA should be used to block any disclosure mandated by the other statute. Indeed, the legislative history is devoid of any evidence at all to suggest that Congress intended subsection (b)(2) to apply only to third-party requests. In holding to the contrary, the court below went far beyond the ambit of statutory construction and based its decision on certain policy arguments with which the government now seeks to support its construction of the statute. *See* pages 12-14, *supra*. But the question presented here concerns Congress's intention in enacting the Privacy Act, and not "whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

B. The Holding Below Is Wholly Inconsistent With Congress's 1974 Amendment To FOIA, Which Increased The Access Rights Of "Any Person" To Law Enforcement Files.

The Seventh Circuit's construction is also belied by Congress's amendment of FOIA Exemption 7, over President Ford's veto, only 40 days before it enacted the Privacy Act. *See* 10 Weekly Compilation of Presidential Documents 1318 (October 17, 1974). FOIA Exemption 7 originally permitted agencies to exempt from disclosure "investigatory *files* compiled for law enforcement purposes except to the extent available by law to a party" (5 U.S.C. § 552(b)(7) (1966); emphasis added). Some courts had expansively construed this exemption to allow agencies to withhold virtually all law enforcement records without judicial review.[15] Since that sweeping construction

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[15] *See, e.g., Center for National Policy Review* v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C.

was inconsistent with Congress's original intention (*see* FOIA Source Book 332-39 (H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974))), Congress amended Exemption 7 to exempt from disclosure only "investigatory *records* compiled for law enforcement purposes," and then "*only to the extent that* the production of such records would" be harmful to one of six specific law enforcement interests (5 U.S.C. § 552(b)(7); emphasis added).

As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 229-30 (1978) (citations omitted), "by substituting the word 'records' for 'files,' [Congress made clear] that courts had to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible commingling by an agency's placing in an investigatory file materials that did not legitimately have to be kept confidential." In addition, as the Court also noted, Congress intended that the courts should scrutinize any arguably exempt records to determine whether any parts of those records actually were exempt from disclosure under one of the six specific criteria stated in Exemption 7 *(id.)*. *See also* FOIA Source Book 293 (120 Cong. Rec. 17019 (1974) (remarks of Senator Kennedy)); FOIA Source Book 515-16 (Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act).

The specific purpose of this amendment was to abrogate the government's ability to withhold whole systems of law enforcement files requested under FOIA, and it was President Ford's specific disagreement with that purpose, among other things, which led him to veto the amendment. *See* 10 Weekly Compilation of Presidential Documents 1318 (October 17, 1974). It is simply inconceivable that Congress would have intended to rebuild into Privacy Act subsection (j) the very same impenetrable barrier to the disclosure of "investigatory files" that it had dismantled only forty days earlier. And it would be perverse indeed for Congress to have intended that result only with

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Cir.), *cert. denied*, 419 U.S. 974 (1974); *Weisberg* v. *U.S. Dept. of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert denied*, 419 U.S. 993 (1974).

respect to those persons for whose especial benefit the Privacy Act was enacted. The government, which has taken its present position only since late 1981, when it filed its appellate brief in *Greentree*, eloquently made this point in its district court brief in that case, in which it stated (674 F.2d at 85 n.27):

> "It would be anomalous indeed for Congress to override a presidential veto, which was in part based on Congress' narrowing of exemption 7, only to reinstate 40 days later (via the Privacy Act) the discretionary power to deny total access to investigatory material. There is no indication whatsoever in the legislative history of the Privacy Act to indicate that Congress intended such an abrupt reversal of its recent narrowing of exemption 7."

The fact that these two bills were considered simultaneously and enacted within weeks of each other further demonstrates that Congress did not intend the systemwide exemption for law enforcement files in subsection (j) to constitute a repeal of FOIA Exemption 7 insofar as first-party requesters are concerned.[26] At the very least, Congress would have manifested such an intent in some tangible way, which it did not do.

C. The Privacy Act Does Not Constitute A Repeal By Implication Of First-Party Access Under FOIA.

Only by ignoring the plain language and legislative history of subsections (b)(2) and (j) of the Privacy Act (5 U.S.C. §§ 552a(b)(2) and (j)) is it necessary to reach the question whether the Privacy Act constitutes an implied appeal of the FOIA access rights of first-party requesters. Repeals by implication are plainly disfavored (*United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)), and the proponent of such a repeal "bears a heavy burden of persuasion."

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[26] The same House Committee members were responsible for managing both the 1974 FOIA amendments and the Privacy Act. As Mr. Erlenborn stated on the House floor on November 20, 1974, (PA Source Book 887 (120 Cong. Rec. 36647)): "I think it is rather fitting that this [privacy] bill comes to the floor today on the same day that reconsidered a motion to override and have overridden the President's veto of the Freedom of Information Act."

Amell v. *United States*, 384 U.S. 158, 165-66 (1966). The proponent must clearly establish either (a) that Congress intended to work such an implied repeal, or (b) that the two statutes are irreconcilable. *Morton* v. *Mancari*, 417 U.S. 535, 549-50 (1974).

To demonstrate that Congress intended to repeal the earlier statute, the proponent must establish an intent that is clear and manifest. *TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Morton* v. *Mancari*, 417 U.S. at 549-50; *Pasades* v. *National City Bank*, 296 U.S. 497, 503 (1936); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842). As this Court has previously held, Congress must have clearly expressed its conscious choice in the matter. *Regional Rail Reorganization Cases*, 419 U.S. 102, 134 (1974). However, neither the language nor the legislative history of the Privacy Act manifests any congressional choice that the Privacy Act should constitute the sole means by which first-party requesters may secure access to government records. Indeed, it is inconceivable that Congress, without uttering a single word on the subject, would have chosen to abrogate the FOIA rights of first-party requesters only 40 days after it had overriden President Ford's veto of its amendment to FOIA Exemption 7, which was designed to perfect the security of those rights for all requesters. The court in *Greentree* was understandably "hard pressed to accept an interpretation of the Privacy Act that in effect repeals, for first-party requesters, those amendments only a few weeks after they were enacted over a Presidential veto" (674 F.2d at 84). "Repeal by implication is not generally favored; less so in this instance" *(id.)*. *See also Porter* v. *U.S. Dep't of Justice*, 717 F.2d at 798 ("We have searched the legislative history of all versions of S. 3418, H.R. 16373, and the compromise bill, which was enacted, and we have found nothing which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of [FOIA] by making it the sole means of access for first-party information").

Neither are the two statutes irreconcilable. As this Court held long ago, "a positive repugnancy" must exist between two statutes to establish an implied repeal; that the later statute "covers some or even all of the cases provided for by" the earlier statute is not sufficient. *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842). *Accord Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480, 489 (1947). When two statutes deal with the same subject matter, the second statute should be presumed to be "merely cumulative or auxiliary." *Wood* v. *United States*, 41 U.S. (16 Pet.) at 363.

The two statutes here are not mutually repugnant. The disclosure provisions in each statute have specific purposes and carefully tailored exemptions which serve those purposes. "The Privacy Act and [FOIA] are perfectly reconcilable by reading the special remedy in section 552a(d) as serving to vindicate privacy interests in a special manner, while leaving standing the preexisting [FOIA] remedy providing access to information for its own sake." *Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797. "Each seeks in different ways to respond to the potential excess of government. Each therefore has its own functions and limitations." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 76.

The divergent specific purposes of the two statutes well demonstrate that Congress did not intend the Privacy Act to constitute a repeal of first-party access to records through FOIA. The purpose of FOIA is to facilitate disclosure of government records, without regard to the identity of the party seeking disclosure. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1-6 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 2-6 (1965). The purpose of the Privacy Act is to provide subjects of government records with some control over the privacy and accuracy of records contained in a "system of records" from which information may be retrieved by name or other personal identifier. *See* 5 U.S.C. 552a(a)(5). As Congress has said, the purpose of the Privacy Act is to "provide[] certain safeguards for an individual against an invasion of personal privacy" (PA

Source Book 501 (Pub. L. 93-579, § 2 (1974))).[17] *See also* H.R. Rep. 1416, 93d Cong., 2d Sess. 2 (1974); S. Rep. 1183, 93d Cong., 2d Sess. 2 (1974). Disclosure under the Privacy Act is geared to achieving this purpose; it is not an end in itself. *See* pages 17-18, *supra*.

Because the Privacy Act and FOIA have different purposes, it is not surprising that their access provisions and exemptions are also different Each statute provides first-party access to some records which are not available under the other. Privacy Act subsection (j)(2) allows certain agencies to exempt entire systems of law enforcement records from the access and other provisions of the Act. Administratively, this is a logical complement to a statute which allows individuals to contest the accuracy of information contained in their files. FOIA Exemption 7, which is designed to allow access as expansive as possible, exempts from disclosure only specific records or portions thereof. When these two provisions are construed together, the most that can be said is that Congress intended that agencies should have discretion to withdraw from subjects of law enforcement records the *special* access and other rights granted by the Privacy Act. There is no support for the conclusion that Congress intended to deprive such persons of the disclosure rights to which they would have been entitled if the Privacy Act had never been enacted.

Continued first-party access under FOIA furthers the purpose of that statute, which is to allow access to information

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[17] These safeguards, which are summarized in the Congressional Statement of Purpose contained in Section 2 of the Privacy Act (PA Source Book 501), include: (1) "permit[ting] an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies," (2) "prohibit[ing] these records from being used or made available for another purpose without his consent," and (3) "permit[ting] an individual to have access to information pertaining to him . . . to have a copy made and to correct or amend such records" to ensure that an agency will "collect, maintain, use, or disseminate" the records only "for a lawful and necessary purpose," and to ensure that records are "accurate and current."

unless withholding is justified on one of the specific grounds set forth in the statute (5 U.S.C. § 552(b)(1)-(b)(9)). On the other hand, the first-party access does not conflict in any way with the central purpose of the Privacy Act, which is to assure individual privacy and the accuracy of individually identifiable records. Indeed, the contrary construction adopted by the court below does violence to the principal purposes of both statutes by blocking access under FOIA to those persons who are most likely to seek such records—on grounds not set forth in FOIA—and by allowing greater access to third parties than to the subjects of the records for whose especial benefit the Privacy Act was enacted. *See* pages 18-20, *supra*.[15]

Nor will the systemwide exemption of subsection (j) be rendered meaningless, as the Seventh Circuit held (J.A. 67), if first-party requesters may obtain some of the same records, or parts of the same records, under FOIA. Since FOIA Exemption 7 blocks disclosure only under FOIA (*see* 5 U.S.C. § 552a(q)), a first-party requester could obtain his entire law enforcement file under the Privacy Act—if subsection (j) did not exist. *Greentree* v. *U.S. Customs Service*, 674 F.2d at 80. Thus, subsection (j) allows government agencies to withhold from first-party requesters records which would otherwise be available to them under the Privacy Act, but not under FOIA. Nor does the fact that a first-party requester retains FOIA access rights mean that requested law enforcement records necessarily will be available under FOIA. To the extent that

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[15] First-party FOIA access serves an important statutory purpose because persons who are the subjects of government records are those most likely to request disclosure of records pertaining to them, and it is only through the granting of disclosure that questionable government practices will be brought to light. As Professor Davis has noted (K. Davis, *Ad. Law Treatise* § 5.6 at 43 (1982 Supp.): "Surprisingly, some [case] law tries to limit the beneficiaries of the [FOI] Act to those who have no selfish motivation but are trying to benefit only the public! If such [case] law were to prevail, perhaps 99% or more of those who seek information would be denied because of their exclusion from the words 'any person.' "

records are exempt from disclosure under the carefully crafted provisions of FOIA Exemption 7, disclosure will be denied.[19]

Although a first-party requester may gain access under FOIA to some records contained in a system of records which an agency has exempted under subsection (j) from the access and other provisions of the Privacy Act, the exemption will have several substantial effects. The requester still may have no right to request the amendment of any errors contained in the records; he still will have no right to know who has seen his records; and he still will have no right to bring a civil action for any violation of the Privacy Act. A first-party requester would, of course, have all these rights if the agency had not exempted the system of records under subsection (j). *See* 5 U.S.C. §§ 552a(c)(3), (d)(2)-(d)(4), (e)(1), and (g).[20]

In sum, the government cannot overcome the strong presumption against repeals by implication under either of the two relevant tests. It is inconceivable that Congress, having considered and adopted the proposed amendment to FOIA

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[19] The foregoing discussion underscores the obvious fact that the government's principal quarrel is with FOIA Exemption 7, not with any provision of the Privacy Act. Since Congress has steadfastly opposed the attempts of the executive branch to carve out a sweeping exemption for all law enforcement files, the executive branch has attempted to accomplish the same result, at least insofar as first-party requesters are concerned, by adopting the contrived construction of the Privacy Act which it urged successfully below. Since the subjects of government records are more likely than third-parties to seek access to law enforcement files, this Court's ratification of the government's construction would go far, as a practical matter, toward reinstating President Ford's veto of the 1974 amendment to FOIA Exemption 7.

[20] *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 81 ("Considering the wider access and administrative rigors of the Privacy Act we have no difficulty understanding why Congress allowed law enforcement agencies to restrict individual access to whole systems of records under the Privacy Act, while allowing the public, including the firstparty, more limited access to some of the same material under FOIA").

Exemption 7 at the same time it was debating the Privacy Act, would have expressly narrowed the scope of that exemption, for the benefit of all requesters, and then, without a single word on the subject, would have broadened it by implication, with respect to the class for whose especial benefit the Privacy Act was passed. Most important, Congress's true intent is manifest in subsection (b)(2) of the Privacy Act, which expressly preserves FOIA access to "any person," and in subsection (j), which limits the scope of its exemptions to the Privacy Act itself. No repeal by implication may be found in the face of those provisions.

D. The Holding Below Is Inconsistent With The Earliest Authoritative Constructions Of The Privacy Act.

The construction adopted by the court below is inconsistent with the earliest scholarly commentaries on the Privacy Act, which uniformly concluded that Congress had not intended to affect the FOIA disclosure rights of first-party requesters when it enacted the Privacy Act.[21] More important, the Seventh Circuit's construction of the Privacy Act is inconsistent with the position taken by those government officials " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new.' " *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), *quoting*

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[21] Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L.J. 301, 312-13 (1976); Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L.L.Rev. 596, 624-26 (1976); Hulett, *Privacy and the Freedom of Information Act*, 27 Ad.L.Rev. 275, 288 (1975); Project, *Government Information and the Rights of Citizens*, 73 Mich.L.Rev. 971, 1337-39 (1975); Note, *FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict*, 8 Loy.U.Chi.L.J. 570, 590-92 (1977); *see also Guidebook to the Freedom of Information and Privacy Acts* 21 (P. Bouchard and J. Franklin ed. 1980).

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1933).[22]

The Office of Management and Budget ("OMB"), which Congress specifically charged with developing government-wide guidelines and regulations for implementing the Privacy Act (PA Source Book 514 (Pub. L. No. 93-579, § 6 (1974))), promptly took the position that the disclosure rights granted to first-party requesters under both statutes were complementary rights. In 1975, prior to the date on which the Privacy Act was to take effect, the OMB adopted the following construction of the statute (40 Fed. Reg. 56742-43; emphasis in original):

> In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act. . . . The net effect of this approach should be to assure the [sic] individuals do not as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.

The OMB's construction of the Privacy Act is entitled to substantial weight, not only because it is the contemporaneous construction of the agency specifically charged by Congress with the task of construing the statute, but also because it represents "the predominant government policy since initial implementation," which "has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 85.

Thus, the Privacy Protection Study Commission, which Congress established in Section 5 of the Act (PA Source Book

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[22] *Accord FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Ford Motor Credit Corp.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Southeastern Community College* v. *Davis* 442 U.S. 397, 406 (1979); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

510 (Pub. L. no. 93-579, § 5 (1974))), has adopted the same construction (*Report of the Privacy Protection Study Commission, Privacy Act of 1974: An Assessment*, App. 4 at 37 (1977)):

> An individual seeking access to an investigatory file, for example, may be able to obtain much broader access if he requests it under the FOIA, because the corresponding PA exemption applies to entire systems of records rather than to records or portions of the records they contain.

See also Senate Subcomm. on Admin. Practice and Procedure, Comm. on the Judiciary, *Report on Oversight Hearings on Agency Implementation of 1974 Amendments to the Freedom of Information Act*, 95th Cong., 2d Sess. 123 n.76 (Comm. Print. 1980) (the Privacy Act "was never intended to restrict access to reports under FOIA").[23]

Although Congress did not charge the Department of Justice with the task of construing and implementing the Privacy Act, the Seventh Circuit accorded weight to a regulation which the Department promulgated in 1975 (40 Fed. Reg. 50642). In that regulation, the Department concurred in the result reached by the OMB, but maintained that continued first-

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[23] The OMB's construction of the Privacy Act is also consistent with the analysis prepared by the Library of Congress, at the request of the Senate Subcommittee on Administrative Practice and Procedure, shortly before the effective date of the statute. The Library of Congress concluded that (PA Source Book 1187 (121 Cong. Rec. 32893 (1974))) "[t]here is nothing in the terms of the Privacy Act or its legislative history which indicates that the Privacy Act is the exclusive means by which an individual can gain access to his own records contained in a system of records." Indeed, "[i]t flies in the face of the whole legislative effort in this area to construe the Privacy Act as a backhanded method to limit individual access to records while at the same time preserving potentially greater access rights to third parties" (*id.*). *See also* 1976 *Annual Report of Congressional Research Service* 25 ("It should be quite apparent by this time that the Privacy Act does not constitute authority to withhold any records sought under the provisions of [FOIA]").

party access under FOIA was "discretionary," rather than mandatory. The Department, which had opposed enactment of the Privacy Act (*see* PA Source Book 772-75), originally took the position that the Privacy Act provided the exclusive means of first-party access, but moderated that view in the face of strong opposition from Congress (*id.* at 1176-1188), finally taking the position that continued access under FOIA was a privilege, not a right. As the *Greentree* court correctly observed (674 F.2d at 85), this regulation must be viewed with circumspection since it clearly represents an attempt to "moderate the impact of an unwelcome enactment." Moreover, the government's understandable lack of confidence in that construction is well demonstrated by the government's failure to rely on it in litigation for some six years after it was formulated. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 85. In any event, the Department's position lacks the power to persuade because it is contrary to the language and legislature of the statute.[24]

III.

PRIVACY ACT SUBSECTION (j) DOES NOT QUALIFY AS A FOIA EXEMPTION (b)(3) STATUTE.

The language and legislative history of the Privacy Act preclude any serious argument that its wholly discretionary and self-contained exemptions to first-party access may be used to block disclosure under FOIA. Continued first-party

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[24] In late 1981, when it filed its appellate brief in *Greentree*, the Department advised the District of Columbia Circuit that the OMB "is currently revising its guidelines to state that the Privacy Act should be considered a FOIA Exemption 3 statute" (674 F.2d 85 n.28). In August 1983, the OMB finally published a revised regulation, for notice and comment (48 Fed. Reg. 36359). That regulation conforms to the Department's present litigating position, but contains no reasoned discussion of the question nor any explanation for the OMB's change in position. *But see* 49 Fed. Reg. 12338 (1984). *See also* 130 Cong. Rec. H310-12 (daily ed. Jan. 31, 1984) (remarks of Messrs. English, Kindness, and Erlenborn).

access under FOIA is guaranteed to "any person" by subsection (b)(2) of the Privacy Act, and the exemptions contained in subsections (j) and (k) of the Privacy Act are expressly limited in their applicability to other provisions of the Privacy Act. *See* pages 11-19, *supra*. Even if these explicit provisions did not exist, however, the Privacy Act exemptions still could not be construed to block first-party access under FOIA. FOIA affirmatively requires that records be made "available to any person" (5 U.S.C. § 552(a)(3)). Thus, even absent the savings provisions contained in the Privacy Act, first-party requesters would still be entitled to seek disclosure under FOIA.

The Seventh Circuit held (J.A. 69) that the discretionary exemptions contained in the Privacy Act are incorporated into FOIA through FOIA Exemption 3. Based on a liberal construction of Exemption 3, which permits nondisclosure where matters (a) "are specifically exempted from disclosure," and (b) also meet the further requirements set forth in two provisos (5 U.S.C. § 552(b)(3)), the Seventh Circuit held (J.A. 69) that records must be deemed exempt from first-party disclosure under FOIA whenever they are contained in a system of records which has been exempted from first-party access under the Privacy Act. That holding is erroneous because subsection (j) of the Privacy Act does not constitute an FOIA Exemption 3 statute.[25]

FOIA Exemption 3 specifically authorizes the nondisclosure of matters that are "*specifically exempted from disclosure by statute* (other than Section 552b of this title), *provided that* such statute (A) requires that the matters be withheld from the public in such a manner as to leave *no discretion* on the issue, or (B) establishes *particular criteria* for withholding or refers to *particular types of matters* to be withheld" (5 U.S.C.

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[25] Neither the *Greentree* nor the *Porter* court found it necessary to reach this question because of their holdings that subsection (b)(2) of the Privacy Act expressly preserves all existing FOIA disclosure rights. *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797; *Greentree* v. *U.S. Customs Service*, 674 F.2d at 79.

§ 552(b)(3); emphasis added). Exemption 3, like all FOIA exemptions, is to be narrowly construed in furtherance of the policy of disclosure which is the heart of the statute. *See Dept. of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). *See also Chrysler Corp.* v. *Brown*, 441 U.S. 281, 290 (1979).

Subsection (j) is not an Exemption 3 statute because it meets neither the "no discretion" requirement of proviso (A) nor the particularity requirement of proviso (B). In addition, subsection (j) permits withholding by agency rule; nothing is, by virtue of subsection (j) itself, "specifically exempted from disclosure by statute."

A. Subsection (j) Does Not Satisfy The Proviso Requirements Of Exemption 3.

Privacy Act subsection (j) is not an Exemption 3 statute because it fails to satisfy the requirements of either proviso of Exemption 3. First, subsection (j) does not qualify as an exempting statute under proviso (A) of Exemption 3, which "requires that matters be withheld *from the public* in such a manner as to leave *no discretion* on the issue" (5 U.S.C. § 552(b)(3)(A); emphasis added). The Privacy Act grants agencies uncanalized discretion to determine what should be withheld. Subsection (j) states that "[t]he head of any agency *may* promulgate rules . . . to exempt *any* system of records within the agency from *any* part of this section except subsection[](b) . . ." (5 U.S.C. § 552a(j); emphasis added). *See* PA Source Book 312 (H.R. Rep. 1416, 93d Cong., 2d Sess. 19 (1974)). Moreover, subsection (j) does not authorize withholding "from the public" because it permits withholding only from first-party requesters under the Privacy Act. Not even the government has contended that subsection (j) authorizes an agency to withhold from third-party requesters records that would otherwise be available to them under FOIA.

Second, subsection (j) does not satisfy the particularity requirements of proviso (B). Subsection (j) permits agencies to exempt from disclosure entire "systems of records." This subsection does not establish "particular criteria for withholding"

because it grants absolute discretion to agency heads to withhold whatever systems of records they please. Nor does subsection (j) refer "to particular types of matters to be withheld." The only argument that could possibly be made to support the view that subsection (j) refers "to particular types of matters to be withheld" is that subsection (j)(2) generally relates to systems of records maintained by law enforcement agencies. But that argument gives the term "particular" a construction so broad as to destroy its meaning. Moreover, that construction is inconsistent with the purpose that Congress has plainly expressed, both when it narrowed FOIA Exemption 7 in 1974 (*see* pages 25-27, *supra*), and when it narrowed FOIA Exemption 3 in 1976 (*see* pages 39-41, *infra*). Indeed, it is absurd to suggest that a statute refers to "particular types of matters" merely because its scope is "restricted" to any system of records maintained by law enforcement agencies.[26]

These important provisos were enacted in 1976 for the specific purpose of removing from the ambit of Exemption 3 those statutes which, like subsection (j), create unfettered agency discretion to withhold entire systems of files. The impetus for Congress's enactment of these provisos was the decision in *FAA* v. *Robertson*, 422 U.S. 255 (1975). In *Robertson*, this Court held that certain withholding provisions of the Federal Aviation Act (49 U.S.C. § 1504), which permitted the FAA to

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[26] Exemption 3 must be narrowly construed for the additional reason that the very concept of a categorical, systemwide exemption is inconsistent with the general requirement of FOIA subsection (b), that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting record after deletion of the portions which are exempt under this subsection" (5 U.S.C. § 552(b)). Similarly, a categorical exemption based on the location of a record within an administratively exempted "system of records" is inconsistent with the judicial review provisions of FOIA (5 U.S.C. § 552(a)(4)(B)), which require the courts to determine whether individual records and *parts* of records have properly been withheld. *See Vaughn* v. *Rosen*, 484 F.2d 828 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

withhold any "information in any application, report, or document filed pursuant to the provisions of this act or of information obtained" by the agency not in the public interest, constituted an Exemption 3 statute. The Court reached this conclusion based on its understanding that the legislative history manifested Congress's intention that Exemption 3 should be broadly construed to encompass all preexisting disclosure exemption statutes (422 U.S. at 265).[27] Congress's disagreement with that construction led to the addition of the two provisos in 1976. *See* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241, 1247 (1976). The relevant House Committee Report succinctly states Congress's purpose (H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. 23 (1976)):

> Believing that the *[Robertson]* decision misconceives the intent of exemption 3 the Committee recommends that the exemption be amended to exempt only materials required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. §§ 2161-2166, which provides explicitly for the protection of certain nuclear data.
>
> Under the amendment, the provisions of the Federal Aviation Act of 1958 that was the subject of Robertson, and which affords the FAA administrator *carte blanche* to withhold any information he pleases would not come within Exemption 3.

See also H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976).

The import of these provisos is plain. As the District of Columbia Circuit has held, "Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the pub-

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[27] Some lower courts, of course, had reached the opposite conclusion, even prior to the adoption of the two provisos. *See, e.g., Schechter* v. *Weinberger*, 506 F.2d 1275, 1276 (D.C. Cir. 1974); *Stretch* v. *Weinberger*, 495 F.2d 639, 640-41 (3d Cir. 1974).

lic." *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220(D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980) (footnote omitted). *See also Church of Scientology* v. *U.S. Postal Service*, 633 F.2d 1327, 1333 (9th Cir. 1980) ("investigatory files . . . complied for law enforcement purposes" lacks specificity required "to take it out of the impermissible range of agency discretion to make decisions rightly belonging to the legislature"). Thus, these provisos manifest Congress's intention to distinguish between those statutes which "in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 629 (D.C. Cir. 1978) (emphasis in original). *See also CPSC* v. *GTE Sylvania*, 447 U.S. 102, 121-22 n.18 (1980).

Since subsection (j) plainly grants absolute and unreviewable discretion to agency heads, and establishes no criteria to inform that discretion, subsection (j) does not meet the requirements of either proviso.

B. Subsection (j) Does Not Satisfy The Requirement Of Exemption 3 That Matters Be Exempt "From Disclosure By Statute."

Even if the proviso requirements of Exemption 3 could be ignored, subsection (j) still would not qualify as an Exemption 3 statute. The scheme established in subsection (j) grants unfettered discretion to agency heads to exempt whatever they please. Of its own force, however, subsection (j) exempts nothing. Thus, whatever is exempted under subsection (j) is exempted by agency rule, not "by statute." This distinction is critical because the language and legislative history of FOIA Exemption 3 both manifest Congress's intention that the question whether particular materials should be exempt from disclosure is a question which must be answered by the legislative branch, rather than by agency officials. *See* H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976).

To qualify under Exemption 3, a statute must contain words of congressional exemption, not mere authorization for further

administrative action. *E.g.*, *Baldridge* v. *Shapiro*, 455 U.S. 345, 355 (1982); *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 122 (1980); *Seymour* v. *Barabba*, 559 F.2d 806, 808-09 (D.C. Cir. 1977). As the Ninth Circuit held in *California* v. *Weinberger*, 505 F.2d 767, 768 (1974):

> There is a real difference between a statute in which the congressional words themselves prohibit disclosure and a statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is a creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute."

Subsection (j) merely authorizes administrative officials to establish exemptions by regulation. Discretionary exemption by agency rule is not equivalent to an exemption which is created by statute *ex proprio vigore*. *Founding Church of Scientology* v. *Bell*, 603 F.2d 945, 952 (D.C. Cir. 1979); *Lee Pharmaceutical* v. *Kreps*, 577 F.2d 610, 616 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). Thus, even if an agency established its own criteria to structure the discretion granted by subsection (j), the "by statute" requirement of Exemption 3 still would not be satisfied.

At all events, Privacy Act subsection (j) does not exempt records "from disclosure." Just as subsection (j) does not withhold "from the public" as contemplated by proviso (A) of Exemption 3, subsection (j) cannot be deemed to exempt records "from disclosure" because it does not authorize agencies to withhold records from *all* requesters. It merely exempts records "from any part of this section," which extends, at most, to the Privacy Act's first-party access provision. To exempt "from disclosure," a statute must keep information confidential. *See Public Citizens Health Research Group* v. *FDA*, 704 F.2d 1280, 1284-86 (D.C. Cir. 1983); *Ferri* v. *Bell*, 645 F.2d 1213, 1217 n.4 (3rd Cir. 1981). Pursuant to subsection (j), agencies are specifically precluded from withholding any records that must be disclosed under other disclosure statutes, such as FOIA (*see* 5 U.S.C. § 552a(b)(2)). Even assuming that subsection (j) permitted withholding insofar as first-party re-

questers are concerned, it is disputed that it could not properly be construed to permit withholding from third-party requesters, and it is therefore clear that this section does not meet the requirements of Exemption 3.

C. The Legislative History Evidences No Congressional Intention That Subsection (j) Be Considered An Exemption 3 Statute.

The legislative history of the Privacy Act contains no suggestion that subsection (j) should be considered an FOIA Exemption 3. *See* 2 J. O'Reily, *Federal Information Disclosure Procedures, Forms and the Law* § 2013 (1981). Although legislative silence may sometimes be considered ambiguous, that is not true in this case. When that silence is considered in light of the fact that Congress was considering this statute at the same time it was revisiting FOIA in late 1974, and was intimately familiar with the provisions of both statutes, it is inconceivable that Congress would have intended the Privacy Act to constitute an Exemption 3 statute without ever mentioning that intention. Moreover, in 1976, when Congress revisited FOIA Exemption 3 in connection with its overruling of this Court's decision in *FAA* v. *Robertson*, 442 U.S. 255 (1975), Congress explicitly considered the relationship of Exemption 3 to numerous statutes, but again, it never mentioned the Privacy Act (H.R. Rep. No. 880, 94th Cong., 2d Sess. (1976)). In light of the failure of subsection (j) to meet the literal requirements of Exemption 3, this legislative silence would be remarkable only if Congress had actually intended subsection (j) to be an Exemption 3 statute.[*]

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[*] Significantly, by the time Congress amended Exemption 3 in 1976, the OMB had already promulgated its construction of the Privacy Act, which held that FOIA and the Privacy Act provided complementary rights to first-party requesters (*see* pages 38-39, *supra*). Only if Congress had disagreed with that construction, which remained the prevailing government policy until late 1981 (*Greentree* v. *U.S. Customs Service*, 674 F.2d at 85), would Congress have had any cause to mention the question in 1976. Since Congress had

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded to the district court to determine whether the requested records must be disclosed under FOIA.

Respectfully submitted.

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explicitly required the OMB to take responsibility for construing and implementing this important statute, it is certainly proper to assume that Congress was aware of the OMB's construction. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("[i]t is always appropriate to assume that our elected officials, like other citizens, know the law").

APPENDIX

APPENDIX A

STATUTES INVOLVED

United States Code, Title 5:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a crimnal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize wihholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

* * *

§ 552a. Records Maintained on individuals

(a) Definitions

* * *

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence.

* * *

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

* * *

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

* * *

(2) required under section 552 of this title;

* * *

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsection (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

* * *

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his dis-

agreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of record shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

* * *

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this

title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (3)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

* * *

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

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No. 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a withholding statute within the scope of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-69) is reported at 721 F.2d 215. The opinion of the district court (J.A. 47-52) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on November 16, 1983. The petition for a writ of certiorari was filed on December 8, 1983, and was granted on April 2, 1984 (J.A. 70). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a, are set forth in full in an appendix to our brief in *United States Department of Justice* v. *Provenzano*, No. 83-1045, at 1a-32a.

STATEMENT

1. Petitioners Gregory Wentz and Alfred Shapiro were each convicted, in unrelated cases, of violating the federal controlled substances laws.[1] At the time of the events described below, both men were incarcerated in the Federal Correctional Institute at Oxford, Wisconsin.

a. In May 1981, petitioner Wentz sent a request to the Drug Enforcement Administration (DEA), seeking a copy of his "entire DEA file" pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a.[2] Thereafter, in July 1981, Wentz made a further request for DEA records containing information used in preparing his pre-sentence report. (J.A. 19).

The DEA informed Wentz, in September 1981, that due to a large backlog of records requests, his request could not be processed immediately but would be

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[1] Petitioner Wentz was convicted of possession with intent to distribute hashish, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. See *United States* v. *Wentz*, 686 F.2d 653 (8th Cir. 1982). Petitioner Shapiro pleaded guilty to distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

[2] The pertinent provisions of the FOIA and the Privacy Act are described in our brief in *Provenzano* (at 2-6).

processed in chronological order after the large number of previously received requests (J.A. 23). In March 1982, before the DEA had acted on his request, Wentz filed suit in the United States District Court for the Western District of Wisconsin, seeking release of his records.

In April 1982, the DEA denied Wentz's request for his records on the ground that they were contained in a system of records that had been exempted by regulation from disclosure under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), and were therefore also subject to withholding pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3) (J.A. 27-28).

b. In October 1981, petitioner Shapiro filed a request with the DEA for a copy of "all records or documents which pertain to any investigation of me or my activities" (J.A. 40). Because of the backlog of records requests, the DEA advised Shapiro that his request would be processed in chronological order in relation to the numerous other records requests that the agency had received. In April 1982, before the DEA had acted on his request (J.A. 44), Shapiro also filed suit in the United States District Court for the Western District of Wisconsin, demanding release of his records (J.A. 7-9). In June 1982, the DEA informed Shapiro that the records he sought were contained in a system of records that had been exempted by regulation from disclosure and that therefore he could not gain access to his records under either the Privacy Act or the FOIA (J.A. 46).

2. In the district court, the DEA moved for summary judgment in both actions, based on affidavits from Russ Arslan, Chief of the DEA's Freedom of Information Division. Arslan's affidavits stated that

the requested records were contained in a system of records that had been exempted from disclosure pursuant to a regulation (28 C.F.R. 16.98) promulgated under Exemption (j)(2) of the Privacy Act (J.A. 12-13, 38-39). Accordingly, the DEA contended that the records sought by petitioners were subject to withholding under both the Privacy Act and Exemption 3 of the FOIA (J.A. 13, 34).

The district court consolidated the two cases and granted the DEA's motions for summary judgment (J.A. 47-52). The court first examined the language of Privacy Act Exemption (j)(2) and FOIA Exemption 3, and concluded that Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3 (J.A. 49-50). The court further concluded that, if the requested records were part of a system of records that had been exempted from disclosure under the Privacy Act, they would also be subject to withholding under the FOIA (J.A. 50).

The district court found that the Arslan affidavits established that the requested records are contained in a system of criminal law enforcement records within the scope of Exemption (j)(2) and that the DEA by regulation had properly exempted this records system from the first party access provision of the Privacy Act, 5 U.S.C. 552a(d)(1) (J.A. 50-51). Accordingly, the court held that the DEA was entitled to withhold the records from petitioners (J.A. 51).

3. The court of appeals affirmed the judgments in both cases (J.A. 53-69). It agreed with the district court that all of the records sought by petitioners are contained within a system of records that had been properly exempted from the first party access requirements of Section (d) of the Privacy Act by

regulations promulgated pursuant to Privacy Act Exemption (j)(2) (J.A. 55-58).[3] (Petitioners do not challenge that determination here.)

The court of appeals then ruled that Privacy Act Exemption (j)(2) is a withholding statute within the scope of FOIA Exemption 3 and that, therefore, documents exempt from access under Exemption (j)(2) are also exempt under the FOIA (J.A. 58-69). After examining the statutory language of the FOIA and the Privacy Act, the court determined that Privacy Act Exemption (j)(2) meets the criteria of FOIA Exemption 3 because it describes with sufficient specificity the types of records agencies have authority to withhold (J.A. 60). The court was not persuaded by petitioners' argument that Privacy Act Exemption (j)(2) could not be considered a FOIA Exemption 3 withholding statute because Congress did not expressly refer to the Privacy Act as an Exemption 3 statute; rather, the court concluded that, so long as a withholding statute meets the requirements of Exemption 3, such an explicit statement is unnecessary (*ibid.*).

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[3] The court of appeals also rejected petitioners' contention that the district court should have required the DEA to prepare a *Vaughn* index in order to justify denial of access pursuant to Exemption (j)(2) (J.A. 57-58). See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The court observed that such indices were unnecessary because Privacy Act Exemption (j) applies generally to entire systems of records, unlike the FOIA exemptions, which usually apply only to individual documents or parts of documents (J.A. 57). Accordingly, once agency records sought by a first party requester are identified as being contained within an exempt system of records, a *Vaughn* index need not be prepared because no further judicial inquiry is required (J.A. 57-58).

In addition, the court of appeals rejected petitioners' argument that the reference in Privacy Act Exemption (j) to an agency's authority to exempt material from the requirements of "this section" (*i.e.*, the Privacy Act) renders this withholding statute outside the scope of FOIA Exemption 3 (J.A. 60-61). The court noted that if this language were read as permitting disclosure under the FOIA of records that have been exempted from disclosure under the Privacy Act, the result would be contrary to the "clearly stated congressional intent" (J.A. 61), as expressed in the legislative history, to create exemptions in the Privacy Act for criminal justice records that are broader than the comparable exemptions in the FOIA (J.A. 63-66). The court concluded that, while "[petitioners'] interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning" (J.A. 67).

Moreover, the court of appeals found that subsection (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2), did not support petitioners' argument that the Privacy Act access exemptions could be circumvented by the mere filing of a document request under the FOIA (J.A. 61-62, 64-66). The court pointed out that both the introductory language of Section (b) and the history of subsection (b)(2) make clear that the subsection governs only third party requests for records and does not apply to requests by individuals for their own files (J.A. 62, 64-65).[4] The court noted

[4] A request by an individual for another person's records is commonly referred to as a "third party request." A request by an individual for his own records is known as a "first party request." We will use this terminology throughout this brief.

that such first party requests are governed exclusively by Section (d) of the Privacy Act, and that Exemption (j)(2) expressly authorizes an agency to exempt itself from the first party access requirements of Section (d) (J.A. 66).

Finally, the court of appeals refused to adopt petitioners' interpretation of the statutes based on the so-called "third party anomaly" theory, which hypothesizes that if the Privacy Act is an Exemption 3 statute, some third party requesters may obtain greater disclosure of an individual's records than would the individual himself. The court concluded that such an anomaly would rarely, if ever, occur, and it observed that the possible existence of the anomaly today shows little about what Congress intended in 1974, when it enacted the Privacy Act (J.A. 68-69).

SUMMARY OF ARGUMENT

The question presented in this case is identical to that in *United States Department of Justice* v. *Provenzano*, cert. granted, No. 83-1045 (Apr. 2, 1984), which the Court has consolidated with this case for purposes of oral argument. Most of the arguments raised by petitioners were anticipated and answered in our opening brief in *Provenzano*.[5] Accordingly, in responding to petitioners' brief, we will rely to a large extent on the discussion contained in our *Provenzano* brief.

Contrary to petitioners' contention, an analysis of the plain language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) establishes that the latter

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[5] A copy of our brief in *Provenzano* has been sent to counsel for petitioners.

is a withholding statute that meets the criteria of Exemption 3. In order to overcome this plain language, petitioners must provide clear evidence of a congressional intent to exclude the Privacy Act exemptions from the coverage of FOIA Exemption 3. This they have failed to do.

A. Privacy Act Exemption (j)(2) contains a description of the "particular types of matters to be withheld," and thus qualifies as a FOIA Exemption 3 statute. Petitioners erroneously contend that Exemption (j)(2) falls outside the scope of Exemption 3 because it grants unfettered withholding discretion to the agencies. On the contrary, Congress in Exemption (j)(2) has described with particularity the types of matters that law enforcement agencies have discretion to withhold. Exemption (j)(2) thus narrows these agencies' discretion sufficiently to satisfy the concerns that led to the 1976 amendment to Exemption 3, which was intended to exclude statutes that gave agencies carte blanche authority to withhold all documents that came into their possession.

Nor is there any merit to petitioners' claim that Privacy Act Exemption (j)(2) fails to qualify under FOIA Exemption 3 because it does not itself mandate nondisclosure but merely authorizes agencies to promulgate exempting regulations. So long as a withholding statute meets the requirements of Exemption 3, it is immaterial whether the statute simply vests nondisclosure discretion with an agency or empowers the agency to exercise that discretion through promulgation of regulations.

Similarly, there is no basis for petitioners' assertion that, in order to qualify under Exemption 3, a withholding statute must provide for total nondisclosure. A number of statutes that fall within the

scope of Exemption 3 permit materials to be disclosed to certain parties and under certain circumstances.

Contrary to petitioners' contention, the use of the term "this section," rather than "this title," in Privacy Act Exemption (j) does not reflect an intention on the part of Congress to exclude Exemption (j) from the scope of Exemption 3 of the FOIA. Petitioners apparently assume that, in order to come within Exemption 3, a withholding statute must contain an express reference to the FOIA. Exemption 3 imposes no such requirement; it incorporates nondisclosure statutes whether or not they refer to the FOIA. For this reason, petitioners' argument that the Privacy Act did not repeal the FOIA by implication is entirely beside the point.

B. As the legislative history of the Privacy Act access exemptions clearly shows, Congress intended to protect sensitive criminal justice records from disclosure to the subjects of those records. In order to achieve this goal, Congress consciously made the Privacy Act access exemptions broader than the comparable FOIA exemptions covering criminal investigative records. Thus, if petitioners are correct that a first party requester may evade the Privacy Act access exemptions simply by filing a FOIA request, Congress would have engaged in a meaningless gesture in enacting the Privacy Act exemptions and expressly making them applicable to subsection (d)(1) of the Privacy Act, which governs first party requests. The court of appeals' sensible construction of the two statutes avoids this illogical result.

C. Petitioners assert that subsection (b)(2) of the Privacy Act establishes that first party requesters like petitioners may use the FOIA to circumvent the broad law enforcement access exemptions in the Privacy Act. Subsection (b)(2) provides an exception

to the Privacy Act's general rule against disclosure where release of a record is required by the FOIA. As the introductory language of Section (b) and the legislative history of subsection (b)(2) make clear, however, subsection (b)(2) applies only to third party requests. In any event, even if subsection (b)(2) were to apply to first party requests, it would not expand the access rights of first party requesters because FOIA Exemption 3 incorporates the Privacy Act's first party access exemptions. Thus, the FOIA does not require the disclosure to first party requesters of records that have been exempted under the Privacy Act.

D. Petitioners identify several "anomalies" that could conceivably arise if Privacy Act Exemption (j)(2) is an Exemption 3 statute. Because petitioners have produced no evidence that Congress was aware of these anomalies, they shed no light on congressional intent in enacting the Privacy Act. Moreover, petitioners' construction of the Privacy Act and the FOIA would produce the most glaring anomaly, and one that Congress plainly wanted to avoid: requiring disclosure of sensitive law enforcement records to the subjects of those records.

ARGUMENT

PRIVACY ACT EXEMPTION (j)(2) IS A WITHHOLDING STATUTE WITHIN THE SCOPE OF EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT, AND THEREFORE DOCUMENTS EXEMPT FROM ACCESS UNDER EXEMPTION (j)(2) ARE ALSO EXEMPT UNDER THE FOIA

The court of appeals held that because Exemption (j)(2) of the Privacy Act qualifies as a withholding statute under FOIA Exemption 3, petitioners may not invoke the FOIA to seek records that they are

barred from obtaining under Privacy Act Exemption (j)(2). Petitioners have sought to minimize the importance of FOIA Exemption 3 to this case. They have focused primarily on the general pro-disclosure policy of the FOIA, on some of Congress's general purposes in enacting the Privacy Act, and on a reading of a provision of the Privacy Act other than the particular Privacy Act exemption at issue, while addressing the language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) only at the end of their brief (Pet. Br. 37-43).[6] As this Court has stated on numerous occasions, however, in construing a statute the analysis must begin, not end, with the statute's plain language. See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It seems to us fairly obvious that petitioners have attempted to avoid dealing with the plain language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) because the language of those statutes "is sufficient to resolve the question presented" (*United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6) in a manner adverse to petitioners.

A. Privacy Act Exemption (j)(2) Is A Withholding Statute Within The Literal Language Of FOIA Exemption 3

In our opening brief in *Provenzano* (at 18-20), we showed that Privacy Act Exemption (j)(2) "refers to particular types of matters to be withheld" and thus constitutes a statutory exception to dis-

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[6] The court of appeals decisions on which petitioners primarily rely do not even consider whether Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute. See *Greentree* v. *United States Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Porter* v. *United States Department of Justice*, 717 F.2d 787, 797 n.11 (3d Cir. 1983).

closure within the meaning of FOIA Exemption 3, 5 U.S.C. 552(b)(3). Exemption (j)(2) is limited in scope to Privacy Act "records" that are kept within "systems of records" maintained by a criminal law enforcement agency and that deal with specifically described law enforcement activities.[7]

Despite the detailed description in Exemption (j)(2) of the types of matters that agencies may withhold, petitioners contend (Pet. Br. 38-41) that Exemption (j)(2) is not a FOIA Exemption 3 statute because it grants withholding discretion to the agencies. Petitioners apparently believe that, in order to

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[7] Privacy Act Exemption (j)(2), 5 U.S.C. 552a(j)(2), provides in pertinent part:

> The head of any agency may promulgate rules * * * to exempt any system of records within the agency from any part of this section [with specified exceptions] if the system of records is
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> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

qualify under Exemption 3, a withholding statute must either exempt material absolutely or define the criteria to be used in determining whether or not to disclose. This argument reads the "particular types of matters" prong out of Exemption 3.

Contrary to petitioners' argument, the language of FOIA Exemption 3 reveals that the exemption encompasses *three* types of withholding statutes: (1) statutes that bar disclosure absolutely; (2) statutes that do not bar disclosure absolutely but that establish specific criteria to guide an agency's exercise of its discretion not to disclose; *and* (3) statutes that do not bar disclosure absolutely or provide criteria for nondisclosure, but that describe the particular types of matters an agency has discretion to withhold.[8]

Petitioners seek to excise this third category from the statute by arguing (Pet. Br. 41) that Privacy Act Exemption (j)(2) does not qualify under FOIA Exemption 3 because it "grants absolute and unreviewable discretion to agency heads, and establishes no criteria to inform that discretion." However, the language and structure of Exemption 3 make clear that, when Congress has described with particularity the types of matters an agency has discretion to withhold, it has narrowed the agency's discretion

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[8] Exemption 3 states that the FOIA does not apply to matters that are—

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

sufficiently to avoid the problems created by statutes, such as the one involved in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), that simply gave an agency carte blanche authority to withhold all documents that happen to come into its possession. See *De Laurentiis* v. *Haig*, 686 F.2d 192, 197 (3d Cir. 1982); *Founding Church of Scientology, Inc.* v. *NSA*, 610 F.2d 824, 827 (D.C. Cir. 1979).

As discussed in our *Provenzano* brief (at 19-20), the courts of appeals have identified, as within the scope of FOIA Exemption 3, a number of statutes that specify the particular types of matters agencies have discretion to withhold without also setting forth particular nondisclosure criteria.[9] When the language of Privacy Act Exemption (j)(2) is compared to that of these other statutes that have been found to fit within the "particular matters" prong of FOIA Exemption 3, the conclusion is inescapable that Exemption (j)(2) is also an Exemption 3 statute.

2. Petitioners next contend (Pet. Br. 41-42) that Exemption (j)(2) is defective because it does not itself mandate nondisclosure, but merely empowers specified agencies to promulgate regulations exempting records systems from the access provisions of the Privacy Act. Accordingly, petitioners argue that this Privacy Act exemption does not meet the requirements of FOIA Exemption 3, which states that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure *by statute*" (5

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[9] See, *e.g.*, *Goland* v. *CIA*, 607 F.2d 339, 349-350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980) (50 U.S.C. 403(d)(3)); *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1219-1221 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980) (35 U.S.C. 122); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742-743 (D.C. Cir. 1983) (8 U.S.C. 1202(f)).

U.S.C. 552(b)(3) (emphasis added)). This contention is unavailing because petitioners have offered no basis to distinguish, for purposes of FOIA Exemption 3, between statutes that simply vest nondisclosure discretion with agencies and statutes that empower agencies to exercise that discretion through promulgation of regulations. In either situation, Congress has by statute given limited nondisclosure discretion to an agency. Indeed, requiring an agency to exercise withholding discretion through published regulations, preceded by notice and an opportunity for public comment and accompanied by a reasoned explanation, is perfectly consistent with Congress's aim of amending FOIA Exemption 3 to restrict the agencies' exercise of withholding discretion. Privacy Act Exemption (j)(2) thus satisfies both the letter and the spirit of FOIA Exemption 3.

Petitioners' position would seem to limit the scope of Exemption 3 to those statutes that themselves mandate which material should not be released. As we have just shown, however, Exemption 3 clearly applies to certain statutes that leave disclosure discretion with an agency. It therefore is immaterial that Privacy Act Exemption (j)(2) does not itself prohibit disclosure of records, but instead authorizes agencies to exempt from disclosure specifically identified material. The fact remains that this statute particularly describes the types of matters that agencies have discretion to withhold. That is sufficient to bring it within the scope of FOIA Exemption 3.

Moreover, as we demonstrated in our brief in *Provenzano* (at 24-30), the legislative history of the Privacy Act exemptions reflects "[a] congressional appreciation of the dangers inherent in airing particular data." *American Jewish Congress* v. *Kreps*,

574 F.2d 624, 628 (D.C. Cir. 1978). In enacting the Privacy Act, Congress took great care to provide a means for agencies to protect sensitive law enforcement records from disclosure to the subjects of those records. Indeed, Congress deliberately made the Privacy Act law enforcement records exemptions broader than the comparable exemptions in the FOIA. See pages 21-23, *infra*.

In short, Congress was aware of the dangers that would flow from disclosure of sensitive law enforcement records, and it was Congress that made the basic policy decision that criminal justice agencies must have authority to bar access to those records when necessary. Thus, Privacy Act Exemption (j)(2) is unlike those statutes that Congress meant to exclude from FOIA Exemption 3 when it amended that exemption following this Court's decision in *FAA Administrator* v. *Robertson*, *supra*.

3. Petitioners seek to engraft on Exemption 3 a requirement that a withholding statute must provide for total nondisclosure. According to petitioners (Pet. Br. 42-43), an Exemption 3 statute cannot permit disclosure under some circumstances but not others. Petitioners do not explain the origin of this additional requirement, for which there is no support in either the language or history of Exemption 3. For our part, we know of no reason why a statute that establishes an access exemption for only certain types of requests cannot qualify as an Exemption 3 statute.

Other Exemption 3 statutes permit materials to be disclosed to certain parties or under certain circumstances. For example, the Tax Reform Act of 1976, 26 U.S.C. 6103, which sets forth a general nondisclosure rule, provides a wide variety of exceptions to that rule, based in part on the identity of the

persons or agencies seeking disclosure. Nevertheless, a number of courts have held that Section 6103 is an Exemption 3 statute. See, *e.g.*, *King* v. *IRS*, 688 F.2d 488, 496 (7th Cir. 1982); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 835-840 (5th Cir.), cert. denied, 444 U.S. 842 (1979). Similarly, Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), which this Court has held to be within Exemption 3 (see *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 122), provides for public disclosure if certain conditions are present (the agency must determine, inter alia, that the information is "accurate" and that disclosure will be "fair in the circumstances"). By the same token, the nondisclosure provision of the Patent Act, 35 U.S.C. 122, is an Exemption 3 statute (see *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1219-1221 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610, 614-617 (9th Cir. 1978)) despite the fact that it permits disclosure when necessary to carry out the provisions of any Act of Congress or when appropriate "special circumstances" exist. Thus, contrary to the premise underlying petitioners' argument, a statute can qualify as a withholding statute under FOIA Exemption 3 even though it proscribes disclosures only for certain classes of requests while allowing others. Accordingly, it is immaterial that Privacy Act Exemption (j)(2) denies access for requests by certain parties but not others.

4. Contrary to petitioners' contention (Pet. Br. 15-16), the use of the term "this section," rather than "this title," in Privacy Act Exemption (j) does not manifest a congressional intention to exclude Exemption (j) from the scope of FOIA Exemption 3. As

we explained in our brief in *Provenzano* (at 20-21), a withholding statute need not include an express reference to the FOIA in order to qualify as an Exemption 3 statute. On the contrary, Exemption 3 incorporates nondisclosure statutes that satisfy its criteria whether or not they expressly refer to the FOIA. Indeed, Exemption 3 clearly was meant to encompass withholding statutes that were enacted before, and therefore that could not have included any reference to, the FOIA. Withholding statutes enacted after the FOIA also have been held to come within Exemption 3, despite the lack of any reference therein to the FOIA. See, *e.g.*, 26 U.S.C. 6103 (Tax Reform Act). Withholding statutes that by their terms meet the requirements of Exemption 3 do not need any further evidence of congressional intent in order to qualify under Exemption 3.[10]

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[10] For this reason, petitioners err in seeking to draw a favorable inference from the fact that the legislative history of the Privacy Act and of the 1976 amendments to FOIA Exemption 3 contain no explicit statement that Congress intended Exemption (j)(2) to be an Exemption 3 statute (Pet. Br. 43). The language of Exemption (j)(2), on its face, demonstrates that that statute is a withholding statute within the meaning of FOIA Exemption 3. As this Court has stated:

> it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (footnote omitted).

As we discuss below (see page 29, *infra*), Congress included subsection (b)(2) in the Privacy Act because otherwise Section (b) of the Act would qualify as a FOIA Exemption 3 statute. The fact that Congress did not include

The fallacy in petitioners' argument may be shown conclusively by examination of the Government in the Sunshine Act, 5 U.S.C. 552b. The Sunshine Act requires that certain agency meetings be open to the public. 5 U.S.C. 552b(b). It then provides exceptions to that requirement, as well as to the mandate that "information pertaining to such [open] meeting[s]" be made public. 5 U.S.C. 552b(c). However, the Sunshine Act nondisclosure provision states only that the open meeting and disclosure requirements *of that statute* shall not apply in particular circumstances.[11] The Sunshine Act is in this sense identical to the Privacy Act; both statutes contain exemptions that authorize agencies to withhold material that otherwise would be disclosed because of other portions of the same statute. Yet, it is clear that Congress believed that the Sunshine Act would qualify as a FOIA Exemption 3 statute, because Congress took care expressly to exclude the Sunshine Act from the

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a similar provision preserving FOIA disclosure rights with respect to matters covered by the Privacy Act exemptions strongly suggests that it intended those exemptions to constitute withholding statutes under Exemption 3.

[11] 5 U.S.C. 552b(c) provides in pertinent part:

> (c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to [come within one of a number of listed exemptions].

scope of Exemption 3.[12] Thus, the fact that Privacy Act Exemption (j)(2) by its terms exempts agencies only from the access requirements of the Privacy Act does not in any way undermine the status of Exemption (j)(2) as a FOIA Exemption 3 statute.

5. Petitioners argue at length (Pet. Br. 27-33) that there is no evidence that Congress intended the Privacy Act to effect a repeal of the FOIA. In our brief in *Provenzano* (at 34-35), however, we pointed out that because Privacy Act Exemption (j)(2) qualifies as a withholding statute within the meaning of FOIA Exemption 3 (and is thereby incorporated into the FOIA), it is not necessary to find that the Privacy Act repealed the FOIA in order to conclude that records exempt from access under the Privacy Act are also exempt under the FOIA. See H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976) (Exemption 3 is intended to "incorporate by reference exemptions contained in [the] * * * statutes" it describes). Petitioners' repeal by implica-

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[12] Indeed, the 1976 amendment to FOIA Exemption 3 was enacted as part of the Sunshine Act. See Pub. L. No. 94-409, § 5(b), 90 Stat. 1247. Exemption 3 of the FOIA, as amended in 1976, provides in pertinent part that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure by statute (*other than section 552b of this title*)" (emphasis added). This qualification would have been unnecessary if petitioners' argument were correct.

As discussed in our *Provenzano* brief (at 22-23), the fact that Exemption 3 of the FOIA does not expressly exclude the Privacy Act exemptions from its coverage—as it does with respect to the exemptions of another related open records statute (the Sunshine Act)—serves to confirm that Congress meant the Privacy Act exemptions to be treated under FOIA Exemption 3 like any other withholding statute. See *Painter* v. *FBI*, 615 F.2d 689, 690-691 (5th Cir. 1980).

tion analysis is entirely irrelevant to the question presented here.

B. Petitioners' Construction Of Exemption (j)(2) Ignores Congress's Deliberate Decision To Fashion Privacy Act Access Exemptions That Are Broader Than Those In The FOIA

Petitioners contend that, in enacting the Privacy Act, Congress established a records access system that was meant to be complementary to, and subject to being overridden by, the disclosure scheme of the FOIA. Petitioners' position is based in part on an examination of the general purposes of the FOIA and the Privacy Act (Pet. Br. 9-11). But the general purposes of these statutes are of little help in determining the specific intent of Congress in creating the Privacy Act access exemptions. Indeed, petitioners overlook the fact that Congress deliberately fashioned the Privacy Act access exemptions so that they would be broader in scope than the comparable FOIA exemptions.

In our brief in *Provenzano* (at 24-27), we showed that Congress created broad access exemptions in the Privacy Act to protect sensitive intelligence and law enforcement files from disclosure to individuals like petitioners who are the subjects of those sensitive records. See H.R. Rep. 93-1416, 93d Cong., 2d Sess. 18 (1974) (*Leg. Hist.* 311); S. Rep. 93-1183, 93d Cong., 2d Sess. 23 (1974) (*Leg. Hist.* 176); 120 Cong. Rec. 36644 (1974) (remarks of Rep. Moorhead) (*Leg. Hist.* 883); 120 Cong. Rec. 36907 (1974) (remarks of Sen. Percy) (*Leg. Hist.* 811); 120 Cong. Rec. 36911 (1974) (remarks of Sen.

Ervin) (*Leg. Hist.* 943).[13] In addition, we pointed (Br. 27-29) to specific evidence of Congress's intent to authorize agencies to prevent first party access to law enforcement records *beyond* the restrictions on disclosure of such records in the FOIA. See H.R. Rep. 93-1416, *supra*, at 19 (*Leg. Hist.* 312); 120 Cong. Rec. 36651 (1974) (remarks of Rep. Ichord) (*Leg. Hist.* 902); 120 Cong Rec. 36656 (1974) (remarks of Rep. Holifield) (*Leg. Hist.* 912). Of particular significance is Congress's rejection of a provision in the Senate bill (S. 3418, 93d Cong., 2d Sess. §203(b) at 29-30 (Nov. 21, 1974); *Leg. Hist.* 362-363) that would have made the Privacy Act's exemption for law enforcement records coextensive with FOIA Exemption 7, and its adoption of the broad law enforcement records exemptions set forth in Sections (j)(2) and (k)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2) and (k)(2).

Thus, contrary to petitioners' assertion (Pet. Br. 13 n.8), there is considerable evidence in the language and history of the Privacy Act to suggest that Congress did indeed intend, with respect to first party requesters, to create a higher barrier to disclosure than that in FOIA Exemption 7. If this Court were to adopt petitioners' position, it would have to conclude that Congress devoted considerable attention to providing Privacy Act access exemptions that are broader than the FOIA exemptions, but nonetheless intended that persons could, simply by resorting to the FOIA, render those Privacy Act exemptions

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[13] "*Leg. Hist.*" refers to Staffs of the Senate and House Comms. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579)* (Comm. Print. 1976).

meaningless insofar as they are broader than the FOIA exemptions.[14]

As the court of appeals concluded (J.A. 66-67), this is an entirely illogical result: "[T]he legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA." To accept petitioners' argument " 'would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947).[15]

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[14] Petitioners argue (Pet. Br. 13 n.8), without citation of supporting authority, that the purpose of Privacy Act Exemption (j) was to prevent first party requesters from having *greater* access to law enforcement investigative records than they already had under the FOIA. This unsupported hypothesis fails to explain why Congress made the Privacy Act's law enforcement records exemptions *broader* than those in the FOIA.

[15] Petitioners argue (Pet. Br. 11-13) that Congress could not have meant the first party access provisions of the Privacy Act to affect the pre-existing disclosure rights of first parties under the FOIA because the right of access provided by the Privacy Act is solely a "means by which subjects of government records can enforce the other rights to which they are entitled under the Privacy Act" (Pet. Br. 11). But there is nothing in the Privacy Act that would prevent an individual from using subsection (d)(1) of the Privacy Act, governing first party access, solely for the purpose of obtaining his own records.

C. Petitioners' Arguments Are Based On A Misreading Of Subsection (b)(2) Of The Privacy Act

The centerpiece of petitioners' contention that the Privacy Act access exemptions have no effect outside that Act is the erroneous reading of Privacy Act subsection (b)(2) adopted by the courts in *Greentree* v. *United States Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982), and *Porter* v. *United States Department of Justice*, 717 F.2d 787, 794 (3d Cir. 1983).[16]

1. Petitioners read Privacy Act subsection (b)(2) as preserving the FOIA disclosure rights of both first and third party requesters (Pet. Br. 12-15); accordingly, they argue that the Privacy Act access exemptions have no impact on FOIA disclosure requests. As we explained in our brief in *Provenzano* (at 35-36), however, the introductory language of Section (b) of the Privacy Act states that the nondisclosure rule of that section does not apply when an individual makes a request for his own records.[17] This language makes it quite clear that the entire section is inapplicable to first party requests. It follows, therefore, that none of the enumerated exceptions to Sec-

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[16] The Third Circuit's discussion of the Privacy Act/FOIA issue in *Porter* was incorporated by reference in that court's decision in *Provenzano* v. *United States Department of Justice*, 717 F.2d 799 (3d Cir. 1983), cert. granted, No. 83-1045 (Apr. 2, 1984).

[17] The opening portion of Section (b) states in pertinent part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, *except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains*, unless disclosure of the record would be [permissible under one of the 12 exceptions]." 5 U.S.C. 552a(b) (emphasis added).

tion (b)'s general nondisclosure rule—including subsection (b)(2)—has any relevance in the case of a first party request such as those made by petitioners.

Petitioners dispute this analysis by arguing (Pet. Br. 12) that the words "any person" in Section (b) demonstrate that the entire section must apply to both first and third party requests. But this reading is contrary to the language and structure of the section, which states at the outset that an agency shall not disclose a record to "any person" *except* pursuant to a written request from the subject of the record. Thus, the rule of nondisclosure to "any person" is modified by the words that immediately follow. Because disclosure to a first party requester is permitted by this introductory language, it makes no sense to conclude that the 12 subsequently enumerated specific exceptions to the nondisclosure rule also apply to first party requests.[18]

Petitioners attempt to avoid the plain language of Section (b) by turning the section upside down. They assert (Pet. Br. 14) that the introductory language of Section (b) applies only when subsection (b)(2) does not. But this interpretation requires one to read the statute from bottom to top, for no apparent reason.[19]

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[18] Further evidence of this point is provided by the fact that the enumerated exceptions other than subsection (b)(2) clearly focus on disclosures to third parties.

[19] Petitioners contend (Pet. Br. 15 n.10) that the critical reference in Section (b) to a written request by the subject of a record was included simply to assure that "written" requests were made because the requester's identity under the Privacy Act is crucial, whereas (according to petitioners) it is not material under the FOIA. Petitioners' focus on the word "written" is misdirected. It is difficult to believe that

2. Petitioners assert (Pet. Br. 21-25) that the legislative history of Privacy Act subsection (b)(2) supports their contention that Congress meant to preserve first party access rights to law enforcement records under the FOIA. As we showed in our *Provenzano* brief (at 37-41), however, petitioners' position is based on a misreading of the legislative history.

The privacy bill that passed the Senate contained a first party access exemption for law enforcement records that was similar to the current version of FOIA Exemption 7. See S. 3418, *supra*, § 203(b) at 29-30 (Nov. 21, 1974); *Leg. Hist.* 362-363. At the same time, the Senate bill contained a provision that would have made the entire bill—including the bill's first party access exemptions—subject to other federal disclosure statutes, including the FOIA. See S. 3418, *supra*, § 205(b) at 32 (Nov. 21, 1974); *Leg. Hist.* 365. Thus, the Senate bill would not have increased a law enforcement agency's ability to protect its records—with respect to both first and third party requests—beyond the protections provided in the FOIA.

The House bill, on the other hand, contained no provision permitting disclosure of personal records;

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the sole purpose of the introductory language of Section (b) was to direct agencies not to honor oral records requests. Rather, we submit that the opening part of Section (b) was meant to exclude first party and consented-to third party requests from the general nondisclosure rule of the section. In any event, petitioners' premise is flawed because most, if not all, agencies require that records requests under the FOIA also be made in writing. See, *e.g.*, 28 C.F.R. 16.3(a) (Department of Justice). Furthermore, at least under FOIA Exemptions 4, 6, and 7(C), the identity of a requester is relevant in determining whether those exemptions can be invoked.

it would have exempted from public disclosure "all individually-identifiable information in Government files" (H.R. Rep. 93-1416, *supra*, at 13; *Leg. Hist.* 306). The first party access exemptions for law enforcement records in the House bill were similar to those in the Privacy Act as ultimately enacted (see H.R. 16373, 93d Cong., 2d Sess. §§ (j) and (k) at 32-34 (Oct. 2, 1974); *Leg. Hist.* 289-291), and thus were considerably broader than those in the Senate bill.

The conferees rejected the provision in the Senate bill that would have made the bill's first party access exemptions subject to the FOIA. Instead, they adopted the House bill's prohibition against public disclosure, but added what is now subsection (b)(2) of the Privacy Act, providing an exception to Section (b)'s nondisclosure rule where *third party* disclosure is required by the FOIA.[20] The conferees retained the broad access exemptions of the House bill, permitting an agency to withhold law enforcement records from *first party* requesters. Thus, the House compromised by permitting disclosure to third parties

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[20] That Privacy Act subsection (b)(2) relates to third party disclosure requests is confirmed by a statement in the Senate Report concerning an earlier version of subsection (b)(2), Section 202(c) of S. 3418, 93d Cong., 2d Sess. 43 (Sept. 26, 1974); *Leg. Hist.* 139. That provision was initially included in the Senate bill in order "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. 93-1183, *supra*, at 71; *Leg. Hist.* 224. Although this provision was deleted from the Senate bill on the floor of the Senate (120 Cong. Rec. 36889 (1974); *Leg. Hist.* 765), a substantially similar provision was inserted into the legislation in conference and became subsection (b)(2) of the Privacy Act.

of records that otherwise would be available under the FOIA, while the Senate compromised by accepting the broad first party access exemptions in the House bill that extend beyond the comparable exemptions in the FOIA.[21] By this compromise, Congress ensured that an individual would not be able to use the FOIA to obtain agency records pertaining to him when those records are exempted from first party access under the Privacy Act.[22]

3. Even if, despite its plain language and history, subsection (b)(2) may be interpreted as governing first party requests, petitioners' argument nevertheless must fail because it does not give effect to FOIA Exemption 3. Subsection (b)(2) states that no

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[21] Contrary to petitioners' contention (Pet. Br. 12, 23, 24-25), this reading of the legislative history is supported by Congress's enactment of Section (q) of the Privacy Act, 5 U.S.C. 552a(q). As the court of appeals pointed out (J.A. 64-65 (footnotes omitted)):

> Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q) without any limiting provisos.

[22] Petitioners' reliance (Pet. Br. 23) on a staff-prepared analysis of the Senate-House compromise (120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989) is misplaced. As we explained in our brief in *Provenzano* (at 40-41), this analysis addresses a situation in which the consent of the subject of a record has not been obtained. Thus, like Section (b) itself, the analysis refers to disclosures pursuant to *third party* requests and sheds no light on congressional intent regarding *first party* requests, such as those made by petitioners.

agency shall disclose any Privacy Act records unless disclosure would be *required* by the FOIA. In determining whether the FOIA requires disclosure, one must look not only to the FOIA's disclosure provisions, but also to all of the FOIA exemptions, including Exemption 3. As discussed above, Exemption 3 states that the FOIA does not apply to matters that are exempted from disclosure by statute. In this situation, FOIA Exemption 3 incorporates the Privacy Act access exemptions, which exempt specified records from first party disclosure. Consequently, because the FOIA does not require disclosure (as a result of the operation of Exemption 3), Privacy Act subsection (b)(2) provides first party requesters with no greater right to disclosure than they would enjoy in the absence of that provision.[23] This analysis does not in any way render subsection (b)(2) meaningless because, as we stated in our *Provenzano* brief (at 36 n.19), without subsection (b)(2), Section (b) itself would constitute a FOIA Exemption 3 statute with respect to unconsented-to third party requests. Of course, in the case of third party re-

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[23] Contrary to petitioners' argument (Pet. Br. 16), the fact that Privacy Act Exemption (j) provides that an agency may not exempt its systems of records from Section (b) does not undermine this analysis. Exemption (j) provides exemptions from the access and certain other requirements of the Privacy Act. Section (b), however, does not affirmatively require an agency to provide access to its records. Indeed, Section (b) is basically a *nondisclosure* provision, with certain limited exceptions. Congress's inclusion of Section (b) in the list of those parts of the Privacy Act that are excluded from Exemption (j) can best be explained by its desire to make clear that the Privacy Act exemptions were not intended to override the general nondisclosure rule of Section (b) or the limited exceptions permitting, but not requiring, disclosures under specified circumstances.

quests, the Privacy Act's first party access exemptions would not prevent access and Exemption 3 would not be called into play.

In sum, petitioners' heavy reliance on subsection (b)(2) is misplaced, and the court of appeals was correct in concluding that this provision does not require release of criminal justice records when access to those records is barred under the Privacy Act.

D. Reading Exemption (j)(2) As An Exemption 3 Statute Best Accomplishes Congress's Purposes

1. Petitioners argue (Pet. Br. 18-20) that if Exemption (j)(2) is a FOIA Exemption 3 statute, several anomalies would arise. They contend that these anomalies prove that Congress could not have intended the result reached here. However, petitioners overlook the fact that the Privacy Act was passed in considerable haste, with compromises being worked out at the last moment. See *Exner* v. *FBI*, 612 F.2d 1202, 1206 n.9 (9th Cir. 1980); *Cell Associates, Inc.* v. *NIH*, 579 F.2d 1155, 1160 (9th Cir. 1978); 120 Cong. Rec. 40410-40412 (1974) (remarks of Sen. Hruska) (*Leg. Hist.* 871-876). Under these circumstances, it is hardly surprising that some unintended difficulties may arise in harmonizing the Privacy Act and the FOIA.

The anomalies noted by petitioners are minor ones that should occur in only a few special instances. On the other hand, if petitioners' position is adopted, a far more significant anomaly arises: the congressional goal of providing comprehensive protection against disclosure of sensitive criminal justice records to the subjects of those records would be endangered. If petitioners are correct, an individual whose access to his criminal investigation records is

absolutely barred by the Privacy Act may nevertheless seek to obtain those records—and may succeed in obtaining at least some of them—under the FOIA. Unless petitioners can solve this anomaly, their position is untenable.

Petitioners echo the D.C. Circuit in *Greentree* (674 F.2d at 80-81) in asserting that, even if the Privacy Act exemptions can be evaded through the FOIA by first party requesters, these exemptions would still retain some meaning because they allow an agency to exempt itself from certain other requirements of the Privacy Act. In our brief in *Provenzano* (at 32-33), we demonstrated that Congress deliberately structured Exemption (j) so as to include the first party access provision among the Privacy Act requirements that can be avoided through agency promulgation of Exemption (j) regulations. Petitioners' construction of the Privacy Act nullifies Congress's explicit direction that Exemption (j) apply to subsection (d)(1). Moreover, as the legislative history clearly shows, Congress in the Privacy Act intentionally created access exemptions for law enforcement records that are broader than the comparable exemptions in the FOIA. To the extent that the Privacy Act access exemptions go beyond those in the FOIA, they undoubtedly would be rendered meaningless if petitioners' view were to prevail.

2. We have discussed the so-called "third party anomaly" in our *Provenzano* brief (at 41-44), and believe it unnecessary to repeat that discussion here. In addition to the "third party anomaly," petitioners argue (Pet. Br. 19-20) that, if Exemption (j)(2) is a FOIA Exemption 3 statute, foreign nationals and business entities would enjoy greater access rights under the FOIA than would other requesters.

This result would obtain because neither foreign nationals nor business entities have access rights under the Privacy Act; accordingly, the broad Privacy Act access exemptions are not applicable to requests made by them.

Although it is conceivable that foreign nationals may file FOIA requests with federal agencies seeking records relating to themselves, the number of such requests is not likely to be significant. Hence, it is understandable that such an "anomaly" would not have captured Congress's attention when it enacted the Privacy Act. With regard to records requests by business entities, it is also not surprising that an anomaly might conceivably occur because Congress in the Privacy Act was plainly focusing on individuals and government records pertaining to them. In any event, we reiterate that petitioners' position, which ignores Congress's intent to provide comprehensive protection against disclosure of criminal justice records to the subjects of those records (beyond the protections available in the FOIA), creates a much more significant anomaly than those identified by petitioners as arising from our interpretation of the statutes. It would be peculiar indeed if the one problem that Congress plainly intended to solve were ignored out of concern that the solution might create anomalies of decidedly lesser magnitude that Congress did not even anticipate.[24]

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[24] Petitioners point out (Pet. Br. 20) that it may be possible for an individual to circumvent the access system established by Congress in the Privacy Act by recruiting a surrogate to act as a third party requester. As we observed in our brief in *Provenzano* (at 44 n.26), this sham request ploy sheds no light on the intent of Congress in enacting the Privacy Act. Furthermore, assuming that such a request would have to be honored, the mere fact that Congress did not enact a foolproof

3. Petitioners argue (Pet. Br. 25-27) that our position is inconsistent with the 1974 amendment to FOIA Exemption 7, 5 U.S.C. 552(b)(7), which is narrower than Privacy Act Exemption (j)(2). Petitioners' argument on this point ignores the fact that Exemption (j)(2) has no effect at all on third party requests and on requests for materials that do not constitute Privacy Act "records." FOIA Exemption 7 thus covers a vast number of documents to which Exemption (j)(2) has no application. Accordingly, if Privacy Act Exemption (j)(2) is an Exemption 3 statute, FOIA Exemption 7, as amended in 1974, would remain fully applicable with respect to a large number of documents and requests. Given the broader reach of FOIA Exemption 7 with respect to the documents covered, and the fact that Congress —shortly after it narrowed FOIA Exemption 7— deliberately fashioned the Privacy Act law enforcement records access exemptions so that they would provide greater protection against disclosure to the subjects of those records than FOIA Exemption 7, it is not at all "inconceivable" (Pet. Br. 26) that Congress intended Privacy Act Exemption (j)(2) to be given its full effect despite the 1974 amendment to Exemption 7.[25]

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system is not a sufficient basis for depriving the Privacy Act access exemptions of all meaning to the extent that they go beyond the exemptions in the FOIA. The possibility that requesters might attempt to exploit possible loopholes in the statute is hardly a justification for not giving the fullest possible effect to the scheme enacted by Congress.

[25] Congress amended Exemption 7 in response to four decisions of the D.C. Circuit. See *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-229 (1978). All of those cases involved

Petitioners seek to undermine our position by stating (Pet. Br. 32 n.19) that the government's "principal quarrel" is with FOIA Exemption 7. That is not correct. Our position in this case does not stem from any quarrel with the scope of Exemption 7. We have not sought to expand the reach of Exemption 7 for third party requests or for requests involving material not covered by the Privacy Act. Rather, we simply contend that Congress made clear its intent in the Privacy Act to provide protection against disclosure of sensitive law enforcement records to first party requesters *beyond* the protections available in FOIA Exemption 7, and that the courts below properly gave effect to that intent.[26]

4. It is well settled that statutes are to be reconciled whenever, and to the fullest extent, possible. See *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). Congress certainly was aware of the FOIA when it passed the Privacy Act. It is difficult to believe that Congress, which enacted a comprehensive scheme governing first party access to criminal investigative records (a scheme containing exemptions broader than those in the FOIA), nevertheless intended the Privacy Act scheme to have no further applicability

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third party requests for agency materials under the FOIA. Thus, it does not appear that Congress was focusing on first party requests when it amended Exemption 7.

[26] Petitioners contend (Pet. Br. 33-36) that their argument is supported by administrative constructions of the FOIA and the Privacy Act. We have addressed this contention in full in our brief in *Provenzano* (at 45-47). We note only that, contrary to petitioners' assertion (Pet. Br. 36 n.24), the current OMB guidelines, which state that Privacy Act Exemption (j) (2) is a FOIA Exemption 3 statute, are supported by a full explanation of OMB's position. See 49 Fed. Reg. 12338-12341 (1984).

once a first party files a request for these records under the FOIA. See *Terkel* v. *Kelley*, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) ("the [FOIA] cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt").[27] Cf. *Chamberlain* v. *Kurtz*, 589 F.2d at 840. The attempt by petitioners to frustrate the congressional intent embodied in the Privacy Act exemptions must accordingly be rejected.

In sum, the courts below correctly ruled that Privacy Act Exemption (j)(2) meets the criteria of FOIA Exemption 3, and that this interpretation accomplishes the congressional purpose of authorizing federal law enforcement agencies to protect their sensitive criminal investigative files from disclosure

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[27] In *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), this Court reached a similar conclusion with respect to the relationship between the Education of the Handicapped Act (EHA) (which provides a detailed and comprehensive remedial scheme for protecting the right of a handicapped child to a free and appropriate public education) on the one hand, and Section 504 of the Rehabilitation Act of 1973 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, on the other. In light of the comprehensive nature of the scheme set out in the EHA, the Court concluded that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme," and that, therefore, "where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Smith* v. *Robinson*, slip op. 19, 20. See also *id.* at 22-28 (reaching the same conclusion where a claim may be available under both the EHA and the general antidiscrimination provision of Section 504).

to the subjects of those files. Accordingly, the judgment below, upholding the DEA's refusal to release petitioners' records to them, should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Nos. 83-1045 and 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.
PETITIONERS

v.

ANTHONY PROVENZANO

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE THIRD AND SEVENTH CIRCUITS

MOTION TO VACATE

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No. 83-1045

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.
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MOTION TO VACATE

The Solicitor General, on behalf of the petitioners in No. 83-1045 and the respondent in No. 83-5878, moves that the judgments of the courts of appeals be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

1. These cases, which were consolidated for purposes of oral argument, present the question whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a

withholding statute within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act. On October 15, 1984, the President signed into law the Central Intelligence Agency Information Act, Public Law No. 98-477, Section 2(c) of which amends the Privacy Act by adding the following provision:

> No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

Under this new provision, it is clear that none of the Privacy Act exemptions, including Exemption (j)(2), may be invoked to bar disclosure of any record sought pursuant to the FOIA.

This new legislation plainly renders the question presented in these cases moot. The issue decided by the courts of appeals—whether, under the law as it existed prior to the recent amendment, the Privacy Act exemptions qualified as FOIA Exemption 3 withholding statutes—is no longer a "live" issue in these cases because, however the Court were to decide that issue, its decision would not affect the rights of the parties before it. These FOIA requests must be judged under the law now in effect. Accordingly, there is no case or controversy concerning the proper interpretation of prior law, and this Court lacks Article III jurisdiction to decide that issue. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Powell* v. *McCormack*, 395 U.S. 486, 496 & n.7 (1969).*

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*Petitioners Shapiro and Wentz have filed a motion for summary reversal in No. 83-5878, arguing that Congress's recent action in amending the Privacy Act merely confirms that they were correct in their

2. Despite the mootness of the question presented, the cases themselves are very much alive, since the nongovernment parties still seek access to their agency records under the FOIA and the government, after processing those records, may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Because this Court has previously determined that the issue decided by the courts of appeals warranted further review, and because the effect of the enactment of legislation mooting that issue is to eliminate the occasion for that review, we believe that the appropriate disposition would be for the Court to vacate the judgments of the courts of appeals and remand the cases for further proceedings in light of the intervening change in the law. The Court has consistently followed this course in similar circumstances. See, *e.g.*, *United States Nuclear Regulatory Comm'n* v. *Sholly*, 459 U.S. 1194 (1983); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981); *IRS* v. *Fruehauf Corp.*, 429 U.S. 1085 (1977). Cf. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

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interpretation of the relationship between the Privacy Act and the FOIA under pre-existing law. This motion for summary reversal is without merit for a number of reasons. First, it is well settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 9 (citations omitted); See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). At all events, because the prior status of the law is entirely academic in light of Public Law No. 98-477, any decision by this Court addressing petitioners' contention would necessarily constitute an advisory opinion, which is barred by Article III. Petitioners cite no authority in support of their peculiar suggestion.

It is therefore respectfully submitted that the judgments of the courts of appeals should be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

REX E. LEE
Solicitor General

OCTOBER 1984

DOJ-1984-10

SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF JUSTICE ET AL.
83–1045 v.
ANTHONY PROVENZANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALFRED B. SHAPIRO AND GREGORY J. WENTZ
83–5878 v.
DRUG ENFORCEMENT ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 83–1045 AND 83–5878. Decided November 26, 1984

PER CURIAM.

These two cases, when they were filed here, presented the issue whether Exemption (j)(2) of the Privacy Act of 1974, 5 U. S. C. § 552a(j)(2), is a withholding statute within the third exemption of the Freedom of Information Act (FOIA), 5 U. S. C. § 552(b)(3). Because the Courts of Appeals below had decided the issue oppositely, 717 F. 2d 799, on rehearing, 722 F. 2d 36 (CA3 1983); 721 F. 2d 215 (CA7 1983), and the conflict deserved resolution, we granted certiorari in both cases and consolidated them for oral argument. —— U. S. —— (1984). See also *Greentree* v. *U. S. Customs Service*, 218 U. S. App. D. C. 231, 674 F. 2d 74 (1982).

The parties now advise us that on October 15, 1984, the President signed into law the Central Intelligence Information Act, Pub. L. 98–477, —— Stat. ——, which, by its § 2(c), amended the Privacy Act by adding the following provision:

> "No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title [FOIA]."

Thereafter, Anthony Provenzano, the respondent in No. 83–1045, and Alfred B. Shapiro and Gregory J. Wentz, the petitioners in No. 83–5878, moved for summary affirmance and summary reversal, respectively, of their judgments below. In his turn, the Solicitor General has filed a motion to vacate those judgments and to remand the cases to the respective Courts of Appeals.

The new legislation, as the parties agree, plainly renders moot the single issue with respect to which certiorari was granted in each of these cases. That issue is no longer alive because, however this Court were to decide the issue, our decision would not affect the rights of the parties. These requests for records now are to be judged under the law presently in effect. See *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S 244, 246 (1971).

The mootness of the particular issue that was presented to us, however, does not mean that the cases themselves do not remain alive. Access to agency records is still sought by the individual litigants and, so far as we know, the Government may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Such matters are better resolved by the courts below in the first instance.

Respondent Provenzano's motion for summary affirmance of the judgment in No. 83–1045 is therefore denied. The motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83–5878 is also denied. Instead, each of the judgments below is vacated, and the cases are remanded to the United States Courts of Appeals for the Third and Seventh Circuits, respectively, for such further proceedings as are indicated.

It is so ordered.

JUSTICE STEVENS, dissenting in No. 83–1045.

In view of the enactment of the Central Intelligence Information Act, Pub. L. 98–477, the petition for writ of certiorari in No. 83–1045 should be dismissed. In my opinion the

new Act does not provide a basis for vacating the judgment of the Court of Appeals in that case.